

DEPUTY ATTORNEY GENERAL
WAR CRIMES GROUP
UNITED STATES DEPARTMENT OF JUSTICE
APR 633
Prepared by

MANUAL
for
TRIAL OF WAR CRIMES AND RELATED
CASES

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Prepared by
DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
WAR CRIMES GROUP
UNITED STATES FORCES EUROPEAN THEATER
AF 633

1 February 1947

FOREWORD

1. The foreword to the 15 July 1946 republication of this "Manual for Trial of War Crimes and Related Cases," is hereby superseded.

2. This Manual for trial of war crimes cases is prescribed for use by all personnel concerned in such trials. It contains a compilation of the directives covering the important aspects of trials, together with citations of authorities derived from past decisions on questions arising therein, as well as prescribed forms for the records of trial.

3. The War Crimes Group will keep this Manual up to date by constant research and annotation, in order that the personnel engaged in trials may at all times be certain that the trials are being properly conducted. To that end, changes in directives and additional authoritative annotations will be supplied as they occur and become available. To accomplish this purpose the pages have been prepared for insertion in a 3-ring binder. There appears on each page, at the top left-hand and top right-hand corners, respectively, the numbers of the section borne by the first section on that page and the date of its issue. Where changes occur, new pages will be supplied, bearing new dates of issue and new or revised section numbers, together with instructions as to the old pages for which they are to be substituted. The Table of Contents will be republished as the need arises.

4. Hereafter all letters forwarding changes will be designated "Change 1," "Change 2," etc., in numerical order. Recipients are requested to file all such change letters in the front of the Manual, after having made the substitutions or the additions of pages indicated in the change letters. If these instructions are followed, the Manual will not only be kept up to date but by checking the change letters against the pages in the Manual, all questions arising from time to time as to whether the Manual is up to date in every respect may be quickly and accurately resolved.

5. Since the 15 July 1946 complete revision of the Manual, the following changes, including those hereby effected, have been made:

<u>Section Altered or Added</u>	<u>Date</u>	<u>Pages Affected</u>	<u>Reason</u>
270	15 Aug 46	108-109.20	Addition paragraph e re confessions against co-accused.



FEB 26 1947

FOREWORD (continued)

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<u>Section Altered or Added</u>	<u>Date</u>	<u>Pages Affected</u>	<u>Reason</u>
450	1 Oct 46	311-312	Sec 450 added re authorization to pay witness fees granted by OTFD by C/N of 29 Aug 46. ✓
120	1 Nov 46	10-15	Inclusion of Theater directive of 14 Oct 46 which superseded directive of 11 July 46, effecting: (a) Correction in par 7a re swearing of court members. (b) Enunciating "hard labor" principle as to prison sentences in par 7c. (c) Clarification of provisions of par 8d as to category of cases on which TIA is to take final action. (d) Spreading of par 12 re subsequent proceeding to authorize trial by General Military Government Courts. ✓
340	1 Dec 46	208-209	Addition of par 340c prescribing numbers of copies of record and policy re introduction and use of written exhibits. ✓
120	1 Feb 47	10	Correction of citation of quoted 14 Oct 46 directive. (Remove old page 10 and substitute new page 10.) ✓
270	1 Feb 47	107-107.1	Substitution of new subparagraph c(2) to clarify universal

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<u>Section Altered or Added</u>	<u>Date</u>	<u>Pages Affected</u>	<u>Reason</u>
270 (cont'd)			admissibility of sworn statements, addition of new subparagraph c(4) re no requirement for foundation evidence to support admissibility of sworn statements, and addition of new subparagraph c(5) amplifying principle that any evidence of probative value is admissible. (Remove old page 107 and substitute new pages 107 and 107.1) ✓
270	1 Feb 1947	109.1	Spreading of rights of accused to elect to make either a sworn or an unsworn statement. (Remove old page 109 1 and substitute new page 109.1) ✓
273	1 Feb 1947	109.2	Addition of new Sec 273 re scope of cross-examination of accused. (add new page 109.2) ✓
283	1 Feb 1947	111	Addition of new Sec 283 to clarify effect of administrative determination of non-availability of witnesses. (Remove old page 111 and substitute new page 111) ✓
501	1 Feb 1947	403	Insertion of desirable showing in record re court's agreement that President will rule on interlocutory question. (Remove old page 403 and substitute new page 403) ✓

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<u>Section Altered or Added</u>	<u>Date</u>	<u>Pages Affected</u>	<u>Reason</u>
501	1 Feb 47	407-408- 409-410	Alteration of Outline of Trial to clarify intended practice re reducing interrogations by the Court and time of interrogation of accused. (Remove old pages 407 to 410, incl., and substitute new pages 407 to 410, inclusive.)
610	1 Feb 47	504	Correction to eliminate statement to effect prosecution and defense counsel are appointed rather than assigned. (Remove old page 504 and substitute new page 504.)
610	1 Feb 47	506-507	Deletion of misleading matter re interrogation of accused by Court. (Remove old pages 506-507 and substitute new pages 506-507.)
610	1 Feb 47	508	Alteration consistent with accused being able to elect re a sworn or an unsworn statement. (Remove old page 508 and substitute new page 508.)

6. Also inclosed, in addition to the new pages above indicated, is new Table of Contents, numbered v to vii, inclusive.

C. F. Straight
C. F. STRAIGHT
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Deputy Theater Judge Advocate
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DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
EUROPEAN COMMAND
APO 178

APR 14 1947

1 April 1947

CHANGE 2

MANUAL FOR TRIAL OF WAR CRIMES AND RELATED CASES

1. Be sure to adhere to the instructions in the Foreword to the Manual, and file this Change 2 in the front of the Manual.

2. Changes:

<u>Section Altered or Added</u>	<u>Date of Change</u>	<u>Pages Affected</u>	<u>Reason</u>
220	1 Apr 47	103	Limitation of interrogations by court to the president. (Remove old page 103 and insert new page 103.)
230	1 Apr 47	104	Provisions for fingerprinting and photographing of accused as an incident of service, and incorporation thereof in record of trial. (Remove old page 104 and insert new page 104.)
501	1 Apr 47	402	Insertion of essential question to court members concerning possible opposition to capital punishment. (Remove old page 402 and insert new page 402.)
501	1 Apr 47	405	Introduction into record of fingerprints and photograph. (Remove old page 405 and insert new page 405.)
501	1 Apr 47	407	Limitation of interrogations by court to the president. (Remove old page 407 and insert new page 407.)
501	1 Apr 47	410	Limitation of interrogations by court to the president. (Remove old page 410 and insert new page 410.)

CHANGE 2, continued.

1 April 1947

<u>Section Altered or Added</u>	<u>Date of Change</u>	<u>Pages Affected</u>	<u>Reason</u>
610	1 Apr 47	504	Insertion of essential question to court members concerning possible opposition to capital punishment. (Remove old page 504 and insert new page 504.) ✓
610	1 Apr 47	505	Introduction into record of fingerprints and photograph. (Remove old page 505 and insert new page 505.) ✓

1 Incl:
New pages 103, 104, 402,
405, 407, 410, 504, 505.

[Signature]
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1 May 1947

CHANGE 3

MANUAL FOR TRIAL OF WAR CRIMES AND RELATED CASES

1. Be sure to adhere to the instructions in the Foreword to the Manual, and file this Change 3 in the front of the Manual.

2. Changes:

<u>Section Altered or Added</u>	<u>Date of Change</u>	<u>Pages Affected</u>	<u>Reason</u>
220	1 May 47	103	Provision for interrogation of accused by any member of court. (Remove old page 103 and insert new page 103.)
501	1 May 47	407, 410	Provision for interrogation of accused by any member of court. (Remove old pages 407 and 410, and insert new pages 407 and 410.)
501	1 May 47	411	Prevention of undue repetition by both prosecution and defense of arguments already presented. (Remove old page 411 and insert new page 411.)

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1 Incl:
New pages 103, 407, 410, 411.

1 February 1947

WAR CRIMES MANUAL
Office of the Deputy Theater Judge Advocate
for War Crimes

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PART I
AUTHORITY FOR TRIAL OF WAR CRIMES

Responsibility for Military Government in US Zone, Germany.

GO 337, this Headquarters, subject, "Responsibility for Military Government in US Zone in Germany," dated 14 Dec 1945, provides as follows:

"1. On the effective date of this order, 1 January 1946, the Offices of Military Government for Bavaria, Wuerttemberg-Baden, and Greater Hesse will each become an independent command under their respective directors, who will report directly to the Commanding General, US Forces, European Theater. The Office of Military Government for Germany (US) and the Office of Military Government (US Zone) may communicate directly with these Laender Offices of Military Government through functional channels in conformity with letter, this headquarters, AG 014.1 GEC-AGO, subject: 'Functional Channels for Military Government,' dated 10 November 1945.

"2. On the effective date of this order, the Commanding Generals, Eastern and Western Military Districts, will cease to command or supervise the activities of these offices or subordinate offices of Military Government within their districts, but will retain general court martial jurisdiction.

"3. Within their respective areas, the Directors of the Offices of Military Government for Bavaria, Wuerttemberg-Baden, and Greater Hesse will command all Offices of Military Government within their Land, and all units and personnel attached or assigned thereto, and will be responsible for:

a. Direction of activities of subordinate Offices of Military Government under their command, including the issuance of necessary directives, orders and instructions.

b. Administration of the US Military and civilian personnel under their command, pertaining to: assignment and transfer of personnel, travel, accounting and records, promotions and demotions, leaves of absence and furloughs, awards and decorations, redeployment and readjustment, and similar matters, and the issuance of orders to carry out the above, in accordance with theater policy.

c. Supervision and control of German civil agencies and German and other civilian activities, directly or through subordinate offices of Military Government.

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adequacy of these resources for that purpose. Whenever Directors consider that order cannot be maintained by the use of such resources, they will request assistance from the District Commanders. In that event the District Commander will use the means at his disposal as required to restore order; and to the extent necessary for this purpose, he may assume direct control of civilian agencies and the civilian population, acting, if possible, in agreement with the Director of the Office of Military Government concerned. Any such action will be terminated as soon as security permits.

"7. g. The Commanding Generals, Eastern and Western Military District, will retain their authority, under current directives, to requisition real property necessary for the discharge of their responsibilities, but all such requisitions will be made through the Offices of Military Government. Directors of Land Offices may present to the Commanding Generals their views as to the effect of such requisitions on military government objectives, but will have no authority to disapprove them and will promptly take necessary action to acquire through the German authorities, the property requested. After taking such action, the Director of the Office of Military Government may submit any objections to the requisition to the Commanding General, United States Forces, European Theater, with copies to the Commanding General of the District.

b. All acquisitions of other types of property or production, or of labor and services, will be made in accordance with current directives and instructions.

"8. The Commanding Generals, Eastern and Western Military Districts, and the Directors of the Offices of Military Government in the same areas will cooperate to assist each other in the performance of their respective responsibilities, and, so far as possible, will agree upon joint action with respect to matters of common concern, subject to prescribed policies and procedures.

"9. In addition to inspections and investigations by the Theater Inspector General, upon request of the Theater Commander the Inspector General of each District Commander will make inspections and investigations, under the direction of the District Commander, of the activities of the Office of Military Government on behalf of the Theater Commander. Reports of such

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inspections and investigations will be submitted to the Theater Commander through the District Commander.

"10. The following letter orders relating to specific activities and functions remain in effect:

a. Letter, this headquarters, AG322.011 GEC-AGO, subject: 'Organization and Responsibility for the Supervision of Civil Transportation in Germany,' 27 November 1945, as amended.

b. Letter, this headquarters, AG 014.1 GEC-AGO, subject: 'Organization of the Department of Communications and Posts, US Zone, Germany,' 29 September 1945, as amended.

c. Letter, this headquarters, AG 322 GCT-AGO, subject: 'Consolidation of Command in the Bremen Sub-District,' 21 November 1945.

d. Letter, this headquarters, AG 013.3 GEC-AGO, subject: 'Review of Cases of Detention by Security Review Boards,' 15 November 1945.

"11. The Directors of the Offices of Military Government for Bavaria, Wuerttemberg-Baden, and Greater Hesse will continue to perform their functions in accordance with directives and instructions as heretofore issued to Commanding Generals, Eastern and Western Military Districts, except as modified by this General Order, or as hereafter modified and supplemented from time to time. From the effective date of this order, such current directives and instructions will be considered as having been issued to the Directors of the Offices of Military Government for the three Laender referred to above.

"12. All current directives and instructions are modified to the extent that they are inconsistent with this order."

SEC 110.

Military Commissions.

In the letter of this Headquarters, file AG 250.4 JAG-AGO, subject, "Military Commissions," Third US Army, etal, dated 25 August 1945, it was directed:

"1. General.

a. Authority to Appoint. You are hereby authorize to appoint military commissions for the trial of

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persons subject to the jurisdiction of such commissions who are charged with violations of the laws or customs of war, of the law of nations, or of the laws of occupied territory or any part thereof. You are not authorized to redelegate such appointing powers.

b. Cases to be Tried. As a matter of policy no case shall be referred to trial before a military commission except when directed by this headquarters. Applications for authority to proceed with such trials will be forwarded to the Deputy Theater Judge Advocate, War Crimes Branch, this headquarters. APO 757.

c. Composition. Military commissions shall be composed of not less than three commissioned officers of the United States Army. There shall also be appointed a trial judge advocate and defense counsel.

d. Conviction or Sentence. The concurrence of at least two-thirds of the members of the commission present at the time of voting shall be necessary for the conviction and for the sentence.

e. Approval of Sentence. No sentence of a military commission appointed under the authority cited in sub-paragraph a, above, shall be carried into execution until the same shall have been approved by the officer appointing the commission or by the officer commanding for the time being.

f. Confirmation of Death Sentence. No sentence of death shall be carried into execution until it shall have been confirmed by the Theater Commander or his designee.

"2. Rules of Procedure. Military Commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings, consistent with the powers of such commissions, and with the rules of procedure herein set forth, as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure, and evidence prescribed for general courts-martial. The provisions of Section VII, paragraph 38-47, War Department FM 27-5, subject: 'Military Government and Civil Affairs,' dated 22 December 1944 are designed as a general guide in this field and will be followed except as amended by this letter or other instructions of this headquarters.

"3. Evidence Admissible. Such evidence shall be admitted before a military commission as, in the opinion of the president of the commission, has probative value to a reasonable man.

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"4. Charges and Specifications. Formal charge and investigation as contemplated in Article of War 70 are not necessary in proceedings before military commissions, although War Department, Adjutant General's Office Form Number 115, may be used as a charge sheet. The charge should designate the offense by its legal name or describe it in terms of international law, preferably without reference to an Article of War. The specification should set forth the details of the act charged with sufficient definiteness to show the jurisdiction of the commission and the status of the accused. The accused shall be furnished with a copy of the charges and specifications. Although no oath is necessary, the charge should be signed by a person subject to military law. At some stage prior to the trial, the charge should be investigated sufficiently to enable the appointing authority to determine that the offense merits trial by military commission. Before directing the trial of any charge, the appointing authority will refer the case to his staff judge advocate for consideration and advice.

"5. Challenges. Members of the military commission may be challenged by the accused or the trial judge advocate for cause stated to the court. Peremptory challenges shall not be allowed.

"6. Oaths. Making such changes as are necessary, the appropriate oaths contained in Article of War 19 shall be administered to members of the commission as well as to the prosecution and to others connected with the trial. All witnesses will be sworn.

"7. Pleas. General and special pleas of the accused should be heard and passed upon by the commission in order to insure a fair and impartial trial.

"8. Fees and Allowances. Fees and allowances for witnesses, court reporters and interpreters will be set as provided in Army Regulations 35-4120, dated 30 July 1943, as changed, or as may be published in future instructions from this headquarters.

"9. Interpreter for Accused. The accused shall have the right to have the proceedings of the commission interpreted into his own language if he so desires.

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"10. Records of Trial.

a. Preparation. Commissions shall keep a record of their proceedings, conforming as nearly as practicable to that prescribed for general courts-martial. Court reporters may be detailed for this purpose. If for any cogent reason it is inexpedient to make a verbatim record of the proceedings by stenographer or in long-hand, the record shall be prepared in form prescribed for special courts-martial, preparing in such case a sufficiently complete summary of the testimony of the witnesses that the reviewing authority may properly evaluate the evidence received by the commission.

b. Disposition. The record of trial will be prepared and authenticated in duplicate and forwarded, together with pertinent accompanying papers, including an original and signed copy of the review of the staff judge advocate, to the Deputy Theater Judge Advocate, War Crimes Branch, this headquarters, APO 757.

"11. Sentence.

a. General. Subject to limitations imposed by this headquarters, military commissions may adjudge any type of punishment referred to in paragraph 45, War Department FM 27-5, subject: 'Military Government and Civil Affairs,' dated 22 December 1943. Commissions may be guided by, but are not limited to, the penalties authorized by the Manual for Courts-martial, the laws of the United States, and of the territory in which the offense was committed or the trial is held.

b. Places of Confinement. Places of confinement will be designated by the appointing authority as in the case of prisoners sentenced to imprisonment by military government courts.

"12. Review.

a. Every record of trial by Military commission will be referred by the appointing authority to his staff judge advocate for review before he acts thereon.

b. Every record of trial in which a death sentence is adjudged, if such sentence is approved and not commuted by the appointing authority, will be forwarded to the Deputy Theater Judge Advocate, War Crimes Branch, this headquarters, APO 757, for review by the Theater Judge Advocate or his deputy and presentation with appropriate recommendations to the confirming authority for action.

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"13. Action Upon Sentences After Confirmation. The action taken by the confirming authority upon sentences requiring confirmation will be notified to the appointing authority, who will issue appropriate orders promulgating the sentence as confirmed and carry the same into execution. In confirmation cases the record of trial will be retained in the office of the Deputy Theater Judge Advocate.

"14. Publicity. Trials will be held in open court, except when security, protection of witnesses, or other considerations make this inadvisable. Full publicity may be given to trial proceedings and execution of death sentences. Press material will be submitted to press censorship in the normal way and will be subject only to normal press censorship restriction to protect counter-intelligence organizations and method.

"15. Mitigation, Remission, etc. The power to order the execution of a sentence, or to confirm a death sentence, of a military commission includes the power to disapprove or vacate in whole, or in part, any finding of guilty, and to mitigate, remit, approve and commute, suspend or to remand for further proceedings or for rehearing before a new military commission.

"16. Reports.

a. The appointing authority will advise the Deputy Theater Judge Advocate, War Crimes Branch, this headquarters, APO 757, by TWX of the result of each trial by military commission immediately upon announcement of findings and sentence.

b. Reports of execution of all death sentences imposed by military commissions will be made to the Deputy Theater Judge Advocate.

"17. Distribution of Orders Promulgating Sentences. The distribution listed below will be included for all orders promulgating sentences of military commissions:

a. Three copies to The Adjutant General, Washington 25, D.C.

b. Two copies to The Judge Advocate General, Washington 25, D.C.

c. One copy to the Adjutant General, US Forces, European Theater, APO 757.

d. Three copies to the Theater Judge Advocate APO 757.

e. Two copies to the Assistant Judge Advocate General with the US Forces, European Theater, APO 887.

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f. Three copies to the Deputy Theater Judge Advocate, War Crimes Branch, APO 757.

"18. All directives and instructions of this and subordinate headquarters relating to military commissions are hereby superseded to the extent inconsistent with this letter."

SEC 111

Authority of Military Commissions To Try War Criminals.

The Deputy Theater Judge Advocate for War Crimes has stated:

"The Military Commission which heard this case was properly constituted and had jurisdiction over the subject matter and of the accused. A military commission has jurisdiction over the inhabitants of an occupied enemy country held by the right of conquest (Par. 7, FM 27-10, Rules of Land Warfare; Coleman v. Tennessee (1878), 97 U.S. 509). Military commissions are not restricted in their jurisdiction by territorial limits. (United States v. Hogg, et al (1865), 8 Rebellion Records, Series II, 674, 678; 56 Harv. Law Review, 1059, 1065). Thus, an offense against the laws of war committed in a country prior to its occupation may properly be tried by a military commission of the victorious army upon occupation. (Memorandum by the Judge Advocate General (SPJGW 1943: 17671, subject: Jurisdiction to Punish War Criminals, 13 December 1943; Dig. Op. JAG, 1912, p. 1067; Trial of Henry Wirz (1868), 40th Cong. 2nd Sess. House of Representatives, Ex. Doc. No. 23; see also cases cited on pages 207-216 in Universality of Jurisdiction Over War Crimes (Covles), reprinted from 33 California Law Review (June 1945)). Civilian nationals of a belligerent power are bound to accord to lawful enemy combatants the treatment required under customary and conventional international law (Art. 2 of the Geneva (Prisoners of War) Convention, 27 July 1929; Art. 23, par (c) of the Annex to the Hague Convention No. IV of 18 October 1907, Change 1, 15 Nov. 1944, par. 345.1, FM 27-10, Rules of Land Warfare). Both the United States and Germany were signatory powers to the cited conventions. The killing of the unarmed prisoners of war in the instant case was intrinsically so barbarous and inhumane that it can properly be said to violate not only the written law of nations, but also those implied concepts and standards of decency to which the nationals of every belligerent are bound by the unwritten law of nations. The offense closely approximated common law murder.

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The jurisdiction of the Commission over the offense and over the accused is beyond question" (United States v. Karl Bloch, Dec 45)

SEC 120 Establishment and Procedure of Military Government Courts.

Relative to establishment of Military Government Courts for the trial of war criminals and the procedure to be followed in such cases the letter of this headquarters, file AG 000.5 JAG-AGG, subject, "Trial of War Crimes Cases," dated 14 October 1946, directs as follows:

"3. Revocation of Authority.

The authority formerly vested in the Commanding General, Third US Army Area, to appoint special Military Government Courts and Military Commissions for the trial of war crimes cases as well as all authority to take other actions in connection therewith has been revoked.

"4. Appointment of Military Government Courts.

Hereafter Military Government Courts for the trial of war crimes cases involving American nationals as victims and mass atrocities committed in the American Zone of Occupation will be appointed by, and all further actions in connection with such cases will be taken by this headquarters. The principles hereinafter set forth will be adhered to in the appointing of such courts and in the taking of such actions.

"5. General.

As a matter of policy, such cases involving offenses against the laws and usages of war or the laws of the occupied territory or any part thereof, commonly known as war crimes, committed prior to 9 May 1945, as may from time to time be determined by the Deputy Theater Judge Advocate for War Crimes, will be tried before specially appointed Military Government Courts except where otherwise directed by the Theater Commander.

"6. Procedural Matters Before Trial.

a. Charges. Charges in the cases contemplated will be prepared under the direction of the Deputy Theater Judge Advocate for War Crimes in the form prescribed for Military Government Courts.

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b. Reference for Trial. The charges will be referred to special Military Government Courts by the Deputy Theater Judge Advocate for War Crimes.

c. United Nations Observers. At the time of referring such charges for trial the Deputy Theater Judge Advocate for War Crimes will determine those United Nations, if any, which in his judgment should be invited to send observers to the trial and will extend such invitations on behalf of the Theater Commander.

d. Appointment of Courts. The courts will be appointed by this headquarters and will be composed of officers within this command. General Military Government Courts and Intermediate Military Government Courts appointed as contemplated herein will consist of not less than five and not less than three members respectively, and the senior member present at each trial will be the president and presiding officer of the court. The orders appointing such courts will detail at least one officer with legal training as a member of such courts. The Deputy Theater Judge Advocate for War Crimes will assign one or more prosecutors and defense counsel but they will not be formally designated in the orders appointing the courts.

"7. Trial.

a. If after the trial has begun a new member is appointed or a member, on account of unavoidable absence during a trial misses part of the proceedings, the president will cause such member to read the record of the proceedings had prior to his being appointed or during absence, as the case may be.

b. The Trial will be conducted according to pertinent Military Government directives and instructions, except that no person will be convicted or sentenced except by the concurrence of two-thirds of all the members present at the time the vote is taken.

c. The effective date of prison sentences will be as provided for other Military Government Courts. Sentences imposing death will provide for the execution thereof by hanging. Confinement without

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"hard labor" will not be imposed, providing, however, that sentences heretofore or hereafter imposed which do not include the words "hard labor" will be construed to require hard labor as a part of the punishment.

"8. Post-trial action.

- a. Irrespective of the result of trial, the accused will be returned to custody pending final disposition.
- b. The prosecuting officer will be responsible for the preparation of the record of trial, which, after being properly authenticated, will be forwarded to the Deputy Theater Judge Advocate for War Crimes who will prepare a written Review and Recommendations for submission to Theater Judge Advocate.
- c. In taking the action prescribed in subparagraph b, above the Deputy Theater Judge Advocate for War Crimes will take into consideration and include in the Review and Recommendations any Petition for Review or request for clemency filed on behalf of the accused.
- d. Except as hereinafter provided in this subparagraph no sentence will be carried into execution until the sentence has been approved by the Theater Commander after having received the recommendations of the Theater Judge Advocate as to the views expressed in the Review and Recommendations. The Theater Judge Advocate is hereby authorized and directed to exercise all of the powers of the Theater Commander in cases where the sentence of death has not been pronounced. The action taken will be entered on the case record in the space provided on Legal Form No. 13 over the signature of the Theater Commander or, in cases where no sentences of death has been pronounced, of the Theater Judge Advocate.

"9. Witnesses to Executions. Death sentences adjudged may be executed without attendance of 'mandatory witnesses' specified in MGR-302.5. Such executions will be attended by such US Army officer or officers as may be designated in the death warrant or order of execution.

"10. Permanent Filing of Records. After final action the case records of all trials will be forwarded to the Deputy Theater Judge Advocate for War Crimes for permanent file.

"11. Cases Being Tried. The tribunals heretofore appointed by the Third US Army Area for the trial of war crimes cases will continue as tribunals of this headquarters and will complete all war crimes

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cases then on trial by such tribunals. Courts appointed by this headquarters will proceed to trial with the war crimes cases heretofore referred to the Third US Army Area for trial. This headquarters will take all appropriate action in connection with war crimes trials heretofore completed by the Third or Seventh US Armies as though such cases had been referred to courts appointed by this headquarters in the first instance.

"12. Mass Atrocity Subsequent Proceedings.

a. Certain mass atrocity cases have heretofore been tried i.e., Majdanek, Dachau and Mauthausen cases wherein the principal participants in the respective mass atrocities were charged with violating the laws and usages of war under particulars alleging that they acted in pursuance of a common design to subject persons to killings, beatings, tortures, starvation abuses and indignities, or particulars substantially to the same effect. The courts pronounced sentences in those cases involving imprisonment and death and of necessity, in view of the issues involved therein, found that the mass atrocity operation involved in each was criminal in nature and that those involved in the mass atrocities acting in pursuance of a common design did subject persons to killings, beatings, tortures, etc.

b. With regard to subsequent proceedings against accused other than those involved in the initial or 'parent' mass atrocity cases heretofore or hereafter tried involving charges and particulars substantially similar to those described in paragraph a, above, it is prescribed as follows:

(1) After final action by the reviewing and confirming authority, if any, in connection with a parent mass atrocity case, this headquarters will appoint one or more Military Government Courts to try such additional individuals as may be charged with participating in the mass atrocity.

(2) In such trial of additional participants in the mass atrocity, the prosecuting officer will furnish the court certified copies of the charge and particulars the findings and the sentences pronounced in the parent case. Thereupon, such Military Government Courts will take judicial notice of the decision rendered in the parent case, including the finding of the court (in the parent case) that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, did subject persons to killings,

*Wolfgang
H. G. Zickler
H. G. Zickler*

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beatings, tortures etc., and no examination of the record in such parent case need be made for this purpose. In such trials of additional participants in the mass atrocity the courts will presume, subject to being rebutted by appropriate evidence, that those shown by competent evidence to have participated in the mass atrocity knew of the criminal nature thereof.

(3) The Military Government Courts will examine the evidence presented to them bearing upon the nature and extent of the participation of the additional participants in the mass atrocity operations and pronounce such sentences, if any, as may be appropriate.

(4) In any instance in which in the opinion of an Intermediate Military Government Court the evidence presented warrants a greater sentence than is within the power of Intermediate Military Government Courts, the court will suspend proceedings with regard to the accused involved and refer the matter to the Deputy Theater Judge Advocate for War Crimes recommending that charges against the accused be referred to a General Military Government Court."

SEC 121

Authority of Military Government Courts to Try War Criminals.

The Supreme Court of the United States has stated that military tribunals do not lose their jurisdiction of war crimes cases by mere cessation of hostilities:

Military commissions and other military tribunals of concurrent jurisdiction may lawfully be convened for the trial of offenses against the laws of war at any time at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government, and do not lose their jurisdiction by a mere cessation of hostilities.
In re Yamashita, 61 and 672, Sup. Ct., October 1945.

SEC 122

Jurisdiction of Military Government Courts of War Crimes Committed Prior to Occupation.

The Deputy Theater Judge Advocate for War Crimes has stated that Military Government Courts have jurisdiction over war crimes committed prior to occupation.

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"The Military Court which heard this case was properly constituted and had jurisdiction over the subject matter and of the accused (Letter, Headquarters, United States Forces, European Theater, AG 000.5-2 GAP, 16 July 1945* subject: "Trial of War Crimes and Related Cases"). Offenses against the laws and usages of war committed prior to occupation are properly cognizable by such specially appointed military courts (Letter Headquarters, United States Forces, European Theater, supra). Such courts are tribunals constituted under the common law of war with jurisdiction analogous to that of military commissions. They are, in fact, military commissions except in name. They have, therefore, jurisdiction of offenses against the international laws of war committed prior to or during belligerent occupation (SPJOK 1943/17671) and over individual perpetrators thereof (Article 2 and 3 of the Geneva (Prisoners of War) Convention, 27 July 1929; Article 23, par (c) of the Annex to the Hague Convention No. IV of 18 October 1907; Change 1, 15 November 1944, par 345.1 FM 27-10, Rules of Land Warfare). It is beyond question that the offense in the instant case - the deliberate murder by a civilian of a surrendered unarmed enemy soldier - constituted unlawful belligerency and was a violation of the laws of war properly triable by a military court having custody of the offender." (United States v. Clemens Wieland, Nov 1945.)

*This directive has been superseded by the letter of this Headquarters, file AG 000.5 JAG-AGC, subject "Trial of War Crimes Cases," dated 14 October 1946. The new letter makes no change in the principles of jurisdiction.

PART II
POLDS AND PROCEDURE

SLC General Directives.
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References is made to: (a) Military Government Regulations, Title 5, Legal and Penal Administration. (b) Letter of this Headquarters, file AG 000.5 MCB-JAG, subject, "Trial of War Crimes Cases", dated 14 October 1946, quoted at length in Part I, supra.

The abbreviations for the foregoing references as hereinafter used are as follows:

MGR - Military Government Regulations, Title 5, Legal and Penal Administration.

L - Letter of this Headquarters, file AG 000.5 MCB-JAG, subject, "Trial of War Crimes Cases", dated 14 October 1946.

The references in Arabic numerals refer to the numbered paragraphs of the citation.

SLC Personnel of The Court.
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General Military Government Courts and Intermediate Military Government Courts shall consist respectively of not less than five (5) members and not less than three (3) members, and, in addition, personnel of the prosecution and defense (L,6d). The senior member of the court present at each trial will be the president and presiding officer of the court (L,6d; MGR 5-301.2). The members of the court are seated according to rank alternately to the right and left of the president, except that ordinarily the lay member should be seated on the immediate left of the president.

If after the trial has begun a new member is appointed or a member, on account of unavoidable absence during a trial misses part of the proceedings, the president will cause such member to read the record of the proceedings had prior to his being seated or during absence, as the case may be (L,7a). Whenever deemed necessary, a Military Government Court may, on its own motion or the request of

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the accused, appoint an impartial adviser to assist the court in a particular case in checking the interpreter or giving testimony or written opinions as an expert on German law, local customs, business practices, or technical matters. Such an adviser may be invited to sit with the court but will not participate in the court's deliberations or in its decisions. He shall be paid pursuant to MGR 5-308. (MGR 5-353.2). The interpreter will be carefully selected with a view to his language qualifications and reliability. He will be instructed to translate directly and in the same person everything that is said, subject to the direction of the court. He will not be permitted to engage in colloquy on his own or to conduct the proceedings in any respect. Statements, questions, and answers should be addressed by all parties directly to the court and by the court to the person concerned and not to the interpreter. (MGR 5-353.3).

SEC
220Duties Of President As Presiding Officer.a. General.

The senior member of the court present at the trial will be the president and presiding officer of the court (L,6d). (All those present in the courtroom stand until the court is seated. The accused and the personnel of the prosecution and defense rise and remain standing until the choice of counsel has been announced.) Any member of the court may sign the record (MGR 5-908). The practice in continental countries is for the presiding judge to conduct the examination of the accused and witnesses and generally to take a leading part in the proceedings. However, this should be done in these trials only when it appears that the prosecutor, defense counsel, or the accused are not familiar with common law procedures. In such event the presiding judge should conduct the proceedings to the extent necessary to protect the interests of the accused and to bring out all the facts relating to the issue being tried (MGR 5-354.2). Otherwise, the presentation of the evidence will be conducted by the prosecution and defense counsel.

b. Interrogations by Court.

Because the practice of pleading to a charge is unfamiliar to the citizens of continental countries and is not known in continental practice, the interrogation

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of the accused by the court at the time of pleading is discretionary. For the purpose of obtaining from the accused sufficient information to determine whether he has the intention of admitting the elements of the charge or denying it, the court will arrange to be provided with a dossier of the case against the accused, prior to the trial, such dossier to contain a summary of all documentary evidence and testimony of the prosecutor's witnesses. This dossier will be studied by the court prior to its examination of the accused. It will be used as a basis for such examination but not regarded as proof of the statements it contains which will have to be established in evidence in the usual way. If the accused appears unable to plead guilty or not guilty, the court will enter a plea on the basis of the accused's statements made during the interrogation, providing, that a plea of guilty will only be entered if the accused expressly admits each and every element of the offense. Otherwise, a plea of not guilty will be entered. The accused's statements made upon the interrogation will form part of the record, and anything he says may be used as evidence for or against him. If the case is complicated, the interrogation will enable the court to appreciate the issues involved and assist in determining what evidence will be relevant and what witnesses or documentary evidence should be procured for the trial. (MGR 5-334.3).

c. Interrogations by court in war crimes trials.

It should be noted that the suggestions in MGR concerning the questioning of the accused by the court primarily relate to ordinary cases in which the court is sitting in a capacity similar to that of a committing magistrate as contrasted with war crimes trials in which adequate prosecution and defense counsel are present.

SEC
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Prosecutor.

a. Qualifications of prosecutor.

Any qualified officer, enlisted or civilian lawyer may serve as prosecutor.

b. Duties of prosecutor.

The prosecutor should (a) familiarize himself with the orders and directives providing for the trial of war criminals and should especially be familiar with the regulations cited in Section 201; (b) serve a copy of the charge sheet upon the accused, complete the "record of service," advise defense counsel of such

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service, and file the original charge sheet in the original record of trial and a duplicate copy in the four duplicate copies of the record; (c) as an incident of the service of charges, cause the accused to be re-finger-printed and re-photographed in duplicate by use of current JCG Form No. 38, and assure that one copy of such completed form is introduced as an exhibit near the outset of the trial and placed in the original copy of the record and that the duplicate copy of such form is placed in the accused's War Crimes Enclosure 201 file, which files move with convicted accused to War Criminal Prisons; (d) arrange with the accused and his defense counsel for the stipulation of pertinent matters which the accused does not wish to contest; (e) arrange with the presiding officer of the court for the date of trial, arrange the courtroom, provide the necessary stationery, arrange for the necessary reporters and interpreters to be present, and notify the Court, other court staff, and witnesses concerning the date of trial; (f) assure that the court receives a dossier of the case against the accused, such dossier to contain a summary of all documentary and written evidence and a summary of the testimony to be given by the witnesses for the prosecution; (g) place before each member of the court, for his use during the trial, a copy of the charges and particulars outlining the offenses for which the accused is being tried; (h) supervise preparation of the record of trial (L, 8b); (i) arrange for transporting the accused with necessary guard and the witnesses for the trial; (j) arrange for sufficient military guards to keep order; (k) make certain that the requisite mess and billeting facilities are available; (l) assure that defense counsel has been furnished with the proper form for Petition of Review; (m) advise the court as to the War Criminal Prison in which the convicted accused should be confined; and (n) draft the necessary commitment to the War Criminal Prison as described in letter, Headquarters, United States Forces, European Theater, file AG 383 JAG-160, subject, "Designation of Prisons for War Criminals," dated 26 February 1947, using Legal Form No. 5 (MGR 5-905).

The above duties of the prosecutor are not exclusive, but they are intended only as a reminder.

SLC
240 Defense Counsel.

a. Qualifications of defense counsel.

Any lawyer not debarred from appearing by the Military Government may appear as defense counsel.

b. Duties of defense counsel.

Within proper limits, the court may with the consent of the accused designate counsel named by the

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accused to represent him in addition to assigned defense counsel, if the nature of the case makes it desirable. When German defense counsel is appointed by the court, the court will authorize the Amtsgericht to pay such defense counsel in the same manner and under the same conditions as provided for payment of defense counsel appointed by German courts.

SEC
250Powers Of The Court.a. General.

A General Military Government Court may impose any lawful sentence including death (MGR 5-300.5). An Intermediate Military Government Court may impose any lawful sentence except death, imprisonment in excess of ten (10) years, or fine in excess of 100,000 Reichsmarks (MGR 300.6). Fines will not normally be imposed in war crimes cases.

A Military Government Court shall have power to summon as a witness any person except a child under 14 years of age, in which case it may summon the parents or guardian to bring the child to attend as a witness, except a member of the US Forces or service personnel of one of the United Nations, in which case the attendance of such witness will be obtained by a request made to the commanding officer of such person to order his attendance (MGR 5-303.1).

Any person whom the court may summon as a witness may be ordered to bring with him any document or article in his possession or under his control which has a bearing on the issues of the case (MGR 5-303.2).

Whenever the court has reason to believe that a witness may be intimidated or become unavailable at the trial, it may direct that he be detained as a material witness (MGR 5-303.3).

The court shall have power to order trial in camera, if it is necessary to prevent any prejudice to the security of the US Forces or for some other exceptional reason (MGR 327.6).

b. Sentences.

The following rules shall govern the imposition of sentences:

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(1) A Military Government Court shall announce its findings on each charge before it and shall pronounce one sentence in respect to all the charges upon which the accused is found guilty.

(2) Every sentence of imprisonment shall state the date of commencement thereof, which, if the accused was previously in custody, shall ordinarily make allowance for the period of custody.

A Military Government Court shall have the power to hold in contempt any person, including the accused, counsel, witnesses, officials, or spectators, who offend the dignity of the court, in any manner, or disregards its orders. Such contempt may be punished by fine, imprisonment, or other appropriate punishment. In exercising its powers to punish for a contempt, a Military Government Court shall make a record which shall be transmitted and reviewed as in the case of any other sentence (MGR 5-333).

SEC 260 Voting On Rulings And Verdicts.

If the members of the court agree, all interlocutory questions arising during the trial may be decided by the president subject to objection by any member of the court. Unless the court has agreed that all interlocutory questions arising during the trial may be decided by the president, subject to the objection by any member of the court, the findings of the court on all interlocutory questions and on all other questions arising during the trial requiring the decision of the court will be determined by a majority vote of all the members present at the time the vote is taken. When the vote is evenly divided the president casts a second vote. Voting is in the inverse order of rank, the president voting last. If, in computing the number of votes required, a fraction results, such fraction will be counted as one. A two-thirds vote of the members present is required to convict, and to assess a punishment on the accused.

SEC 270 Rules Of Evidence.

a. Non-applicability of AW 25 and AW 38.

A directive to a military tribunal charged with trial of offenses against the laws of war to the effect

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that it will admit "such evidence as in its opinion will be an assistance in proving or disproving the charge, or such as in (its) opinion would have probative value in the mind of a reasonable man" is not contrary to the provisions of Article 25 or Article 38 of the Articles of War. Persons charged with the commission of a war crime are not "persons subject to military law" within the meaning of the Articles of War and are not entitled to their benefit (in re YAMASHITA, #61 and #672, Sup. Ct., October 1945).

b. Non-applicability of rules of evidence for Courts-Martial.

The rules of evidence as known in British and American courts (or as set forth in the Manual for Courts-Martial) do not apply to proceedings before Military Government Courts. The only positive rules binding upon them are those set forth in MGR 5-329. Hearsay evidence is admissible, but when an issue is important and controverted, every reasonable effort will be made to obtain the direct testimony of witnesses. Generally, the best evidence available will be required, and all evidence which will aid in determining the truth will be admitted (MGR 5-354.4).

c. General rules of evidence.

Evidence shall be admitted in accordance with the following rules:

(1) A Military Government Court shall in general admit oral, written, and physical evidence having a bearing on the issues before it, and may exclude any evidence which in its opinion is of no value as proof. If security is at stake, evidence may be taken in camera, or in exceptional cases where security demands it may be excluded altogether.

(2) The court shall in general require the production of the best evidence reasonably available. However, this principle is not to be confused with the "best evidence rule." The latter is definitely not applicable (see paragraph d, this Section 270, below, and Section 280, post). In this connection, it is emphasized that the sworn statements of accused and witnesses are always admissible regardless of the presence or absence of those who made the statements, unless the court is of the opinion that statements have no probative value or, to apply a similar test, that the statements would not be helpful in arriving at a true finding.

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(3) Evidence of bad character of an accused shall be admissible before finding only when the accused person has introduced evidence as to his own good character or as to the bad character of any witness for the prosecution (MGR 5-329).

(4) War crimes tribunals will not require foundation evidence to establish that sworn statements offered in evidence were voluntarily procured or the qualifications of war crimes investigative personnel participating in such procurement. On the other hand, war crimes tribunals will presume, subject to being rebutted by competent evidence, that sworn statements procured by war crimes investigative personnel from accused and witnesses were voluntarily made and that all interpreters and other personnel assisting in the procurement of such statements were qualified by training and otherwise to perform the tasks assigned. Evidence, if any, by opposing counsel to overcome this presumption will not be admitted prior to the admission of such statements but may be offered by such counsel in the regular course of the introduction of evidence to support their side of the case.

(5) Courts will to the greatest possible extent apply expeditious and non-technical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rule, the following will be deemed admissible if they appear to the war crimes tribunal to contain information of probative value relating to the charges and particulars: affidavits, depositions, interrogations, and other statements, diaries, letters, orders, directives, memoranda, bulletins, circulars, other communications and documents, as well as the records, or extracts therefrom, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay.

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d. Non-applicability of "best evidence rule".

In determining questions involving the best evidence available, the court should keep in mind the difficulties involved in procuring evidence concerning crimes committed months or even years prior to occupation, the fact that witnesses may be and often are hostile, the destruction of primary records due to the war and the difficulties involved in the division of Germany into four zones of occupation. In admitting evidence which might be objectionable, if the "best evidence rule" were applicable to war crimes trials the court need only satisfy itself that the original records or the author of a statement cannot be produced, after reasonably diligent effort to do so, that the evidence offered is of probative value, and that the accused will not unreasonably be prejudiced by admission of such evidence. The controlling factor should always be whether evidence admitted is helpful in arriving at a true finding.

e. Admissibility of extra-judicial confession or admission against co-accused.

The Deputy Theater Judge Advocate for War Crimes has adopted the following opinion concerning the admissibility in evidence in war crimes cases of the statements of one accused, made out of court, against his co-accused (Letter, Deputy Theater Judge Advocate for War Crimes, subject: "Admissibility before a Military Government Court of extra-judicial statement of co-accused," dated 10 November 1945).

"The rules of procedure in Military Government Courts provide that 'Military Government Courts shall in general admit all written and physical evidence having a bearing on the issues before it, and may exclude any evidence which in its opinion is of no value as proof'. (Rule 12 (1) Section 305, page 37, Military Government Germany, Technical Manual for Legal and Prison Officers, 2d edition.)* This rule permits the admission of any evidence 'which in the opinion of the court is of probative value.' The Guide to Procedure in Military Government Courts provides that hearsay evidence, including the statements of the witness not produced, is admissible in Military Government Courts. These authorities

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most certainly permit the admission of hearsay evidence.

"The general rule, applicable in courts-martial, that the confession or admission of one accused, made out of court, is admissible only as against such accused, is simply an application of the hearsay rule. A confession or admission, made out of court, is admissible against the maker as an exception to such rule, (M.C.M. par. 114; FM 27-255, par. 94) and, of course, that exception is not applicable when the statement is used against another accused. The fact that the basis for the admissibility of an extra-judicial statement of one accused against another accused is simply the application of the hearsay rule is demonstrated by the fact that one co-accused may testify in court against his co-accused.

"It is clear that a statement made out of court by one accused is admissible before a military government court against all accused to the same extent as any other hearsay evidence."

* The cited authority has been superseded by MCR 5-329. The wording in the new authority is identical with that of the cited authority.

f. Rights of witnesses.

Any person other than the accused may be required to testify before a Military Government Court, except a person of unsound mind, providing that no witness shall be required to incriminate himself and providing also that a court shall not compel.

(1) A husband or a wife or a parent or a child to give evidence against the other;

(2) A legal adviser to disclose any communication between himself and a client made in the course of a professional relationship, except when the communication was part of or connected with an unlawful act or omission,

(3) A priest (or other minister of religion)

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to disclose any communication made in the course of a confession (MGR 5-332).

These privileges are personal to the witness and except when claimed by the witness are not allowed.

In connection with self-incrimination, if the witness asserts that the answer to a question might incriminate him, the court, and not the witness, will decide whether answer to the question could have that effect and may require the witness to answer.

An accused has no privilege against self-incrimination. He will not be warned that he is not required to answer when questions are put to him. However, he will not be compelled to answer questions nor may he be sentenced for contempt for refusing to answer. If he refuses to answer any questions put to him, the court may draw an unfavorable inference from his refusal to answer (MGR 5-354.5).

g. Oaths.

The accused may elect to make either a sworn or unsworn statement. The record of trial before either Military Government Courts or Military Commissions should indicate whether the accused's testimony is sworn or unsworn. In this connection, the following quotation from a case involving a trial before a Military Commission is of interest:

"The record should show, in trial by military commission, whether accused's testimony is sworn or unsworn. Failure of the record to do so is not, however, prejudicial, when it is clear that his testimony was given voluntarily and when the record contains ample evidence aliunde to show accused's guilt" (UNITED STATES v. DOMINIKUS THOMAS, Opinion, DTJAWC, December 1945).

The court may at any stage of the examination question any witness and may call or recall any witness at any time before finding, if it considers it necessary in the interests of justice (MGR 5-327.3).

"The record of trial indicated that a witness for the prosecution, who testified only concerning the facts surrounding the

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taking of pre-trial statements from the two accused, was not administered an oath before testifying. Both accused stated in the record of trial that the statements were correctly reported and interpreted and did not contend that they were improperly obtained. Held that the irregularity did not injuriously affect any substantial right of the accused" (UNITED STATES v. WILHELM DIETERMAN, Opinion, DTJAWC, December, 1945).

SEC
273Scope of Cross-Examination of Accused.

An accused may not be required to testify before a Military Government Court, as indicated in paragraph f, Section 270, supra. However, having taken the stand to testify, he may be cross-examined as to any matters relating to the charge and particulars under which he is being tried, irrespective of whether all such matters were touched upon during direct examination.

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SEC 280 Testimony In Reports Of Investigation.

The Deputy Theater Judge Advocate for War Crimes stated in a letter, file AG 000.5, subject, "Admissibility of Reports of Investigation in the Trial of Suspected War Criminals", dated 6 October 1945:

"In many instances it will not be possible to obtain the presence at the trial of a suspected war criminal or witnesses who have previously given pertinent testimony to the officer investigating the alleged war crime. It is the position of this office that such testimony (whether a narrative statement or in question and answer form) may be introduced in evidence without further authentication if it was procured by an officer officially appointed to investigate war crimes. The presence of the investigating officer at the trial is not required, either to authenticate such testimony or to authenticate his own report of investigation (which may summarize, incorporate, or have appended thereto the testimony of the absent witnesses). Any objection based on the hearsay nature of such documents or the need for authentication thereof may properly be overruled by the court. (See Rule 12 (1), Sec. 305, Rules of Procedure in Military Government Courts, Part IV, par. 5a, page 25, Outline of Procedure for Trial of Certain War Criminals by General and Intermediate Government Courts and par. 3, ltr. (File AG 250.4 JAG-AGO, 25 August 1945, USFET, subject, Military Commissions)).

"The above is not intended to invite prosecutors to dispense with the procurement of the best and most forceful evidence reasonably available. However, numerous factors may make it impracticable in many cases to secure the personal presence of witnesses and, in such cases, the trial should not be

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needlessly delayed nor should admissible evidence be excluded by reason of their absence."

ANNOTATION:

It should be noted that paragraph 2 of the foregoing letter should be read in connection with MGR 5-329 (b) and should be liberally interpreted by courts, keeping in mind the provisions of Section 270, supra, and MGR 5-354.4.

SEC
283Finality of Administrative Determination re Procurement of Witnesses for Prosecution or Defense

Requests by the prosecution or the defense for the procurement of witnesses will be filed in a timely manner with the Counsel Section, Dachau Detachment. Administrative determinations by the Deputy Theater Judge Advocate for War Crimes as to the practicability of procuring the personal presence of such witnesses will be final and binding on prosecution and defense counsel and the courts. In all instances where he determines it to be impracticable to procure the personal presence of witnesses, the courts will proceed with the trials.

PART III PROCEDURAL SUGGESTIONS

Stipulations.

A stipulation is an agreement between the prosecution, accused, and the defense counsel, either as to facts (that certain facts are true), or as to testimony (that if a certain witness were present in court he would give the following testimony) - (here set out the expected testimony). In a stipulation as to testimony to be given by a witness, if present, there is no agreement as to the verity of such testimony, but it is on the same plane as the testimony of those witnesses who appear in person and testify.

Stipulations are entered into with a view of saving time, labor and expense. Stipulations should be drawn to cover as many of the unimportant and uncontested matters which necessarily must be established by either side. Stipulations may be agreed to by all parties prior to the trial, but in all cases of the use of stipulations in the trial the record must show that they are agreed upon by the prosecutor, the accused, and the defense counsel in open court. The record must also show that such stipulations were received by the court. They need not be accepted by the court when any doubt exists as to the accused's understanding of what is involved. Stipulations should not be made as to vital matters amounting to a complete defense or substantially admitting the accused's guilt. Stipulations should be closely scrutinized by the court before acceptance.

The court is not bound by a stipulation, even if received. For instance, the court's own inquiry may convince it that the stipulated fact is not true. The court may permit a stipulation to be withdrawn, and if so withdrawn, it is not effective for any purpose.

Stipulations as to facts may be written or oral. Such a stipulation may be in the form:

"It is stipulated between the accused, his counsel, and the prosecution that (here set out the facts stipulated)."

If the stipulation is in written form, the side offering

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it may show it to the other side and offer it in evidence. If oral, it is stated in court. The accused and his counsel should announce in open court that they join in the stipulation. The court may assure itself by questioning, if necessary, that the accused fully understands the contents of the stipulation and that it is otherwise proper.

The court will then announce whether the stipulation is received by the court.

Stipulations as to testimony:

(PROS) (DC): It is stipulated between the accused, his counsel, and the prosecution, that, if _____ were in court, _____ would testify as follows, (or would testify as shown in the statement, Exhibit _____, which I now offer.)

COURT: (The court should announce its decision as to receiving the stipulation as above).

The following forms may be used for stipulations entered into as to facts prior to trial

Bad Homburg, Germany,
15 July 1945

STIPULATION

It is hereby stipulated and agreed by and between the prosecution, defense, and the accused, as follows:

That 1st Lt. Jos. R. Cannon, A G, US Army, O-1679543, was shot down near Bremen, Germany on 10 day of January 1945, and that he was confined in F Camp Stalag Luft 3 from the 11th day of January 1945 until 20th day of April 1945, when he was liberated by the troops of the US Army.

/s/ Thomas D. MacFadden,
/t/ THOMAS D. MACFADDEN,
Capt., 180th Inf.,
Prosecutor.

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/s/ Cecil T. People
/t/ CECIL T. PEOPLE,
Capt., 179th Inf.,
Defense Counsel.

/s/ Hans Schmidt
HANS SCHMIDT,
Accused

The following form of Stipulation may be used as to expected testimony.

Bad Nomburg, Germany,
15 July 1945.

STIPULATION

It is hereby stipulated and agreed by and between the prosecution, the defense, and the accused, that if private John Brown, 796th MP Bn, US Army, were present, he would testify as follows:

I was a member of the 796th MP Bn, US Army, on duty 15 February 1945, at POW Stockade near Rheims, France, when the accused, Hans Schmidt, was delivered to me for confinement in said stockade by a Sgt. Jones, 30th Inf. US Army. Schmidt was then in the uniform of a soldier in the German Army.

/s/ Thomas D. MacFadden,
/t/ THOMAS D. MACFADDEN,
Capt., 180th Inf.,

/s/ Cecil T. People
CECIL T. PEOPLE,
Capt., 179th Inf.,
Defense Counsel.

/s/ Hans Schmidt,
HANS SCHMIDT,
Accused.

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Judicial Notice.

Certain kinds of facts need not be proved because the court is authorized to recognize their existence without proof. Such recognition is termed "Judicial Notice".

Among matters of which a Military Government Court may take judicial notice are the following:

The Constitution, treaties, and other general laws of the United States; the law of nations, rules of war as interpreted and construed by the United States of America.

The great seal of the United States and those of its possessions and of the several States and Territories; the seals of all courts of record of the United States and its Territories and possessions and of the several States; the seal of a notary public; the seal of the Adjutant General's Office.

The ordinary divisions of time, as to years, months, weeks, etc., general facts and laws of nature, including their ordinary operations and effects; and general fact of history; current condition of war and peace.

The organization of the Army, including the Army Regulations, the Official Army Register, the Army List and Directory, the provisions of official Army Manuals, the existence and location of service commands, reservation posts, and stations of troops, as published to the Army the fact that an officer belongs to a certain organization, branch, etc., the organization and component parts of the German Army.

General orders, bulletins, and circulars of the War Department; War Department orders regarding General Courts-Martial, Military Commissions, Military Tribunals, and Military Government Courts. General orders, circulars, bulletins, orders regarding General Courts-martial, Military Commissions and Tribunals, and Military Government Courts of the appointing authority, and of all higher authority, and all manuals, directives, rules, orders, and publications of Military Government, Military Government Courts and Commissions in occupied Germany.

All proclamations, ordinances, laws, notices, and other

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regulations for the people of the occupied territory of Germany, or any sub-divisions thereof; German laws in force in the territory wherein the court is sitting; and all matters of common knowledge in such territory.

The seal of an Adjutant General's Office on a certificate is prima facie evidence that the signature thereon is that of an Adjutant General or one of his assistants.

The principle of judicial notice does not prohibit the court from receiving evidence of a fact of which it is authorized to take judicial notice, and, if not satisfied with the existence of the fact, of which it is asked to take judicial notice, it may resort to any authentic source of information.

For example, where the terms of a general order of the War Department are material, the court may send for a copy of the order.

It is customary for the side desiring the court to take judicial notice of a given fact to ask the court to do so, at the same time presenting any available authentic source of information on the subject.

SEC 320

Expert Witness.

If the witness is to be used as an expert, in addition to developing the name, age, residence and nationality of the witness, facts should be adduced showing the education, especially the specialized education, if any, along the line for which the witness is offered as an expert; the number of years the witness has been engaged in such line of work and the place of such work; the opportunities his work afforded for him to learn about his speciality; the text books, magazine articles, etc., he has written on his speciality; honors conferred upon him by Governments, institutions, foundations, or recognized organizations devoted to his speciality; and any other facts that would be of value to the ordinary man in determining if the witness is so well qualified in his speciality as to merit the title of expert.

SEC 330

Real Evidence.

Material things, such as watches, coats, pistols, etc. when relevant, may be offered as exhibits in the same manner as documentary evidence. Although the court has the right to consider such evidence as in its opinion has value as proof, and while not REQUIRED, it is

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suggested - in order that the court may be fully acquainted with the facts bearing on the identification and custody of the article and so that the record will indicate to the reviewing authority the exact nature thereof - that each article be identified by appropriate evidence and that proof be made of the custody of such articles in an unbroken chain from the time they originally came into possession of the offering side until the very instant of offering in evidence. If a witness is available who can identify the object as the one in question and that such object is in substantially the same condition as it was when first coming into the possession of the offering side, there is no necessity for a strict accounting of its possession in the interim. If due to the nature of the evidence, it is impracticable to attach it to the record the party offering it should request authority to withdraw it at the end of the trial. In such case the party offering it should develop by testimony a description of the article sufficient to enable the reviewing authority to visualize it.

These articles should be handed to the court reporter and be marked as exhibits "for identification" prior to the questioning of the witnesses who are to furnish the proof whereby the articles are properly identified for admission in evidence. They should then be offered in evidence by some such statement as:

"I now offer in evidence Prosecution's (or Defense Exhibit No. _____) (Identification No.)"

IN ALL CASES OF EXHIBITS BE SURE TO INTRODUCE THE EVIDENCE AFTER IT HAS BEEN PROPERLY IDENTIFIED, AND HAVE THE RECORD SO SHOW.

Tags, stickers, or adhesive tape may be used by the court reporter to affix properly his mark of identification to articles, such as pistols, knives, guns, etc. on which written marks would not show or would wear off easily.

SEC 340

Documentary Evidence.

a. General.

All documents and other written instruments which in

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the opinion of the court have a bearing on the issues before it and have probative value are admissible in evidence, including proceedings of Boards and Courts of Inquiry; investigations by Inspectors General or other investigating officers and reports of War Crimes Investigation Teams, either in whole or in part; affidavits and depositions of witnesses (including affidavits which have been translated into a language different from that used by the witness in making the affidavit.)

While not REQUIRED, it is suggested - in order that the court may be fully acquainted with their nature and source and so that the record will indicate to the reviewing authority the exact nature thereof - that the proof of authenticity of all documents and written instruments received in evidence be established in the normal way.

b. Introduction.

A predicate for the introduction of evidence of this character might well include, but not necessarily be limited to, the following steps, assuming the document to be an affidavit or written statement:

- (1) Identification of the written statement by the witness (who has been placed on the stand, sworn and identified).
- (2) The introduction of evidence of the execution of the document in the presence of the witness or otherwise by the person whose signature appears thereon.
- (3) The identification of the signature of the person executing it.

After the court has "admitted" any document or instrument, it must be "introduced" in evidence as an exhibit and given an exhibit number so that it will become a part of the record.

All documents should be handed to the court reporter to be marked as exhibits "for identification" prior to the questioning of the witnesses who are to furnish the proof whereby the articles are properly identified for admission in evidence. After the proper predicate has been laid for the admission of the article it should then be offered in evidence by some such statement as:

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"I now offer in evidence Prosecution's (or Defense's) Exhibit No. __ (Identification No.)".

c. Copies of Record and Reproduction of Written Exhibits.

An original and four copies of the transcript of the record will be prepared for the use of the Deputy Theater Judge Advocate for War Crimes. In this connection, investigation procedure has required the procurement of sworn testimony and other written evidence in an original and two duplicate copies. Consequently, while such written exhibits should be introduced and read to the court, etc., in the same manner as is the practice in ordinary trials, shortage of court reporters, etc., dictates that such written exhibits not be physically reproduced in the record. Of course, the record of trial should affirmatively show that each such written exhibit was read to the court. Consequently, the original and the first duplicate copy of written exhibits will be attached to original and first duplicate copy of the transcript, respectively. In the event that first and second duplicate copies of all written exhibits are not available in the files submitted to the chief prosecutor, authenticated copies thereof will be made, one attached to the first duplicate copy of the transcript, and a second placed in the case file folder.

SEC 350

Authority to Administer Oaths during Investigations.

As to the authority of military personnel to administer oaths, the letter of this Headquarters, file AG 210.6 MP., subject: "Investigations in Connection with Alleged War Crimes", dated 15 April 1945, provides as follows:

"All commissioned officers assigned to duty with the War Crimes Branch of the Judge Advocate Section of this and other headquarters in this Theater are, within the purview of Article of War 114, hereby detailed to conduct such investigations in connection with alleged war crimes as may be directed by the commanding general of the command concerned."

As to the authority for civilians to administer oaths, the letter of this Headquarters, file AG 230 GAF-ACCP, subject: "Authority for Civilians to Administer Oaths in Connection with War Crimes Investigations," dated 2 April 1945, provides as follows:

SLOC 350

"All civilians with professional grades or CAF grades of (7) or above, assigned for duty and serving with the War Crimes Group of the Judge Advocate Division of this headquarters, the War Crimes Branch of the Judge Advocate Section of other headquarters in this Theater, or War Crimes Investigating Teams assigned to any headquarters, shall have the power to administer oaths in connection with war crimes investigations, as may be directed by the commanding general of the command concerned."

SLOC 360

Action in Case of Insanity of Accused.

Whenever a court is satisfied that the accused is unable by reason of insanity to understand the nature of the charges against him or the proceedings of the court, or that the accused committed the offense for which he is being tried but was insane when he committed it, the court shall record a finding of either such fact and may make an order providing for temporary custody pending direction by the reviewing authority for permanent custody or other disposition. (MGR-5-335).

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PART IV

ANNOTATIONS PREPARED BY WAR CRIMES GROUP
ON LEGAL QUESTIONS ARISING
IN TRIALS OF WAR CRIMINALSSEC 401 Defense Of Superior Orders.

a. Extract from the London Agreement of 8 August 1945, "Concerning Prosecution and Punishment of Major War Criminals of the European Axis":

"The fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute an absolute defense but may be considered either in defense or in mitigation of punishment if the tribunal before which the charges are being tried determines that justice so requires."

b. Extract from FM 27-10, WD, US Army, "Rules of Land Warfare":

"Liability of offending individuals (Added)-- Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished." (Par. 345.1, 15 Nov. '44).

c. Extracts from paragraph 253, page 453, "International Law", Volume II, Sixth Edition, 1940, by Oppenheim, edited by H. Lauterpacht, concerning the plea of superior orders:

"The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment

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by the injured belligerent. A different view has occasionally been adopted in military manuals and by writers, but it is difficult to regard it as expressing a sound legal principle ... the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity. To limit liability to the person responsible for the order may frequently amount, in practice to concentrating responsibility on the head of the State whose accountability, from the point of view of both international and constitutional law, is controversial ..."

* * * * *

"The German Supreme Court held in the Llandovery Castle, a case decided in the course of the so-called Leipzig Trials, that the defense of superior orders would afford no justification where the act was manifestly and indisputably contrary to International Laws as, for instance, in the case of killing of unarmed enemies or of shipwrecked persons who have taken refuge in lifeboats."

d. Foot-note from Page 53 of "Military Occupation and the Rule of the Law", by Ernst Fraenkel:

"It may be mentioned that Goebbels, writing on 'The Air Terror of our Enemies', declared early in 1944 that 'No international law on warfare is in existence which provides that a soldier who has committed a mean crime can escape punishment by pleading as his defense that he followed the commands of his superiors. This holds particularly true if those commands are contrary to all human ethics and opposed to the well-established international usage of warfare' (Berliner Borsenzeitung, 28 May 1944)."

e. Extract from Opinion of Deputy Theater Judge Advocate for War Crimes in the case of UNITED STATES v. ALBERT BURY and WILHELM HAFNER, September, 1945:

"Assuming, for the sake of argument, that the accused killed the victim in compliance with superior orders, it becomes necessary to pass directly upon the validity of such a defense."

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The most recent statement concerning what effect, if any, is to be accorded to superior orders, is found in Change 1, par. 345.1, WD FM 27-10, dated 15 November 1944. Said paragraph provides: 'Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.'

'Paragraph 148, MCM, 1928, provides in part ... 'The general rule is that the acts of a subordinate officer or soldier, done in good faith, and without malice in compliance with his supposed duty, or of superior order, are justifiable, unless such acts are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know to be illegal (Wharton on Homicide).'

'Mr. Justice Jackson, the Chief Counsel for the United States, in the prosecution of Axis war crimes, has considered the question of the defense of superior orders. He stated: 'With the doctrine of immunity of a head of state usually is coupled another that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility. There is doubtless a sphere in which the defense of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out. But the case may be greatly altered where one has discretion because of rank or the latitude of his orders. And, of course, the defense of superior orders cannot apply in the case of voluntary participation in a criminal or conspiratorial organiza-

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tion, such as the Gestapo or S.S. An accused should be allowed to show the facts about superior orders. The Tribunal can then determine whether they constitute a defense or merely extenuating circumstances, or perhaps carry no weight at all." (Report to the President of United States, 7 June 1945).

f. Extract from Opinion of Deputy Theater Judge Advocate for War Crimes in the case of UNITED STATES v. DOMINIKUS THOMAS, December, 1945:

"Little citation of authority is necessary to sustain the position that obedience of flagrantly illegal orders, such as these, is no defense to a criminal charge of murder. Assuming that the Home Guard to which the accused belonged was a military organization, and that Eich, as local leader, ordered accused to kill deceased, it was an order so palpably illegal that accused should have refused to obey (See Oppenheim, International Law, Vol. II, 8th Ed., page 453, and particularly footnote 1 on page 455, in which the German Supreme Court held in the case of the Llandovery Castle (Annual Digest, 23, 24, Case No. 235 (1921)) that superior orders constituted no defense to a palpably illegal act such as killing unarmed enemies). It is also noteworthy that Eich, who gave the order, was not present at the time accused carried it out, and that it was carried out some time later and at a distance from the place where the order had been given. In other words, accused was not acting under any sort of immediate compulsion. He had time to reflect upon the illegality of his act, and he practically admits in his confession that he then knew he was doing wrong from both the legal and moral point of view. On the basis of his own confessions and testimony, accused was guilty of the offense charged."

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Liability Of Multiple Participants In War Crimes.

a. Principle enunciated in the case of In Re Yamashita, #61 and #672, Supreme Court, October, 1945:

A military superior who fails to control the operations of the subordinate members of his

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command by "permitting them to commit" extensive and widespread atrocities which constitute violations of the laws of war may thereby be guilty of a disregard for and failure in his duty, and so be convicted of violation of the laws of war.

b. Extract from the London Agreement of 8 August 1945, "Concerning Prosecution and Punishment of Major War Criminals of the European Axis":

"The prosecution may invoke where applicable, and the tribunal before which the charges are tried shall recognize and apply, the general rule of liability that those who participate in the formulation and execution of a criminal plan involving multiple crimes are liable for each of the offenses committed and responsible for the acts of each other."

c. Extract from Opinion of Deputy Theater Judge Advocate for War Crimes in the case of UNITED STATES v. JOSEF HARTGEN, et al., October, 1945:

"Such evidence establishes conclusively that each of the five accused herein considered, actively contributed to the death of the airmen. They were motivated by a common design and legally are all principals in the perpetration of the murders. It matters not that some assumed more brutal roles than others, or that the injuries inflicted by some were more severe than those inflicted by the others. All who join in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are responsible for a homicide committed by one of them while acting in pursuance of or in furtherance of the common design, although not specifically contemplated by the parties, or even forbidden by defendant, or although the actual perpetrator is not identified. (29 Corpus Juris, Sec. 46, p. 1073). The findings of guilty are sustained, and the sentences justified, by the evidence."

d. Extract from Opinion of Deputy Theater Judge Advocate for War Crimes in the case of UNITED STATES v. FRANZ STRASSER, December, 1945:

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"The accused was represented by able military counsel. It appears from the record of trial and accompanying papers that Captain LINDEMEYER, who participated in the murders, committed suicide prior to the trial, and that WOLFF and NELBOCK, who also participated in the murders, have not yet been apprehended. There is no indication that accused was prejudiced by the absence of his associates and, obviously, it was not incumbent upon the prosecution to produce WOLFF and NELBOCK at the trial."

e. Principle enunciated in the case of UNITED STATES v. ANTON SCHOSSER, December, 1945:

Three accused, A, B, and C, were jointly charged with wilfully, deliberately, and wrongfully encouraging, aiding, abetting, and participating in the killing of an American soldier prisoner of war. Prior to arraignment, counsel for all three accused moved for a severance as to either A or B and C. It appears from the evidence presented against A that B's and C's defenses would be almost diametrically opposed to that of A. Under such circumstances, the same defense counsel would be hard put properly to represent all three accused at the same trial, and the severance was properly granted.

f. Extract from Opinion of Deputy Theater Judge Advocate for War Crimes, same case:

"At the close of the defense's case, the prosecution moved to delete the names of Wilm and Goldbrunner from the charge sheet in accordance with the severance granted by the Commission (R 42). After granting the severance requested, the Commission permitted the prosecution to elect which accused should be tried first. As pointed out by the Staff Judge Advocate in his review, both actions were technically incorrect. The Commission should have made its own decision as to which of the two sets of accused should have been tried first. Likewise, it is proper for an

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accused to be tried separately on a specification which alleges a joint offense (CM ETO 3927, Fleming). No actual physical deletion of the names was ever made. Neither error prejudiced any substantial right of the accused."

SEC Jurisdiction Of Military Government Courts To Try War
420 Crimes Cases Involving Allied But No American Nationals.

a. Extract from Opinion of Deputy Theater Judge Advocate for War Crimes in the case of UNITED STATES v. ALFONS KLEIN, et al., (HADAMAR CASE), February, 1946:

"Labors of such deportees" (NOTE: 476 Polish and Russian nationals murdered by 7 German nationals tried in the instant case) "had a direct relation to the total warfare then being waged by the German Reich (Lomkin, Axis Rule in Occupied Europe (1944), pp 21, 22, 67-69, 72-73, 83). Deportation of inhabitants of an occupied country is itself a war crime (Pitt Cobbett's, Loading Cases on International Law, 5th Ed., Vol. 2 (1937), p. 171; Feilchenfeld, The International Economic Law of Belligerent Occupation (1942), p. 91; Oppenheim, International Law, Vol. II, 6th Ed., Rev. Sec. 170, p. 345), and contrary to the spirit of Article 46 of the Hague Convention, which enjoins the obligation to respect family honor and rights, and 'the lives of persons'.

"It is well established that a belligerent may try and punish by military commission or other appropriate tribunal, individuals who commit violations of the laws of war against its own citizens, army or territory (Pars. 346 c, 347, FM 27-10, Rules of Land Warfare; British Manual of Military Law, Ch. XIV, Sec. 441; Ex Parte Quirin, 317 U. S., 1, 25-28 (1942); Dig. Op. JAG, 1912, p. 1067, SPJGW 1943/3-29, 26 Feb. 1943, Bull. JAG Vol. II, No. 2, pp 51, 54; Winthrop, Military Law and Precedent (2nd Ed. 1920), pp 793, 838; Oppenheim, International Law, 6th Ed., (1940), p. 451; Spaight, War Rights on Land (1911), pp 280, 462; Garner, International Law and the World War (1920), Vol. II, pp 469, 476; Hall, International Law, 8th Ed., (1924), sec. 135).

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"As early as 1612, Grotius stated: 'The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any person whatsoever.' (Grotius, De Jure Belli Ac Pacis Libri Tres (1612) Carnegie Trans. 1925, p. 504).

"Wheaton, in his Elements of International Law, 6th Ed., Vol. I, (1929), p. 269, declares that the judicial process of every independent state extends to the punishment of 'offenses against the common law of nations, by whomsoever and wheresoever committed'. Hall, in his Treatise on International Law, (8th Ed., (1924), Sec. 135, states that a belligerent possesses 'the right of punishing persons who have violated the laws of war if they afterward fall into his hands'. Oppenheim says, 'the right of the belligerent to punish, during the war, such war criminals as fall into his hands is a well-recognized principle of international law. It is a right of which he may effectively avail himself after he has occupied all or part of enemy territory and is thus in the position to seize war criminals who happen to be there.' (Oppenheim, International Law, 6th Ed., Rev., Vol. II, 1944, Sec. 257 a).

"Section 345.1, Rules of Land Warfare, FM 27-10, C 1, 15 November 1944, states the liability of offending individuals in part as follows: 'Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment...' (Underscoring supplied).

"It has previously been held by this office that obedience of military orders which are

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obviously and flagrantly illegal does not constitute a defense to a criminal charge which arises out of such obedience (cf. United States v. Dominikus Thomas; United States v. Albert Bury and Wilhelm Hainer; Case of Dithmar and Boldt (Llandovery Castle), 16 American Journal of International Law, p. 708, reprinted at p. 767, The Law of Nations, by Herbert W. Briggs). A fortiori the same rule applies with added force to orders from other administrative or governmental bodies."

b. Principles enunciated in The Judge Advocate General's Opinion, Memorandum for The Joint Intelligence Committee, The Joint Chiefs of Staff, file: SPJGW 1943/17671, subject: "Jurisdiction to Punish War Criminals," dated 13 December 1943:

In October of 1943, shortly before the capture by American troops of the town of Calazzo on the Volturno River, in Italy, some German troops fighting there executed without trial 23 Italian civilians whom they accused of aiding the American troops. The killing took place on the same day that the Badoglio government declared war on Germany and on which it was recognized as a co-belligerent of the United Nations. The Germans responsible for the executions were subsequently captured by the Americans. In an exhaustive consideration of the evidence and law pertaining to the occurrence, the Judge Advocate General of the United States Army concluded as follows:

"a. The putting to death by German troops without trial of twenty-three Italian civilians at Calazzo constituted an offense against the laws of war.

"b. The United States Army, by military commission, and the Italian government, ... by whatever tribunal its laws provide, have concurrent jurisdiction to punish those committing the above offense.

"c. Whether the accused shall be tried by military commission of the United States or by an Italian tribunal is a question of policy."

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SEC Rights of Accused.
430

a. Extract from Opinion of Deputy Theater Judge Advocate for War Crimes in the case of UNITED STATES v. HARTGEN, et al., October 1945:

"German counsel contended in the closing argument that they were not fully advised prior to trial of the evidence to be presented by the prosecution. Such a right is an inherent part of neither American criminal jurisprudence nor of a criminal trial under international law. Moreover, no objection was made to the Commission prior to or during the trial as to this point by defense counsel. The almost unlimited right of cross-examination exercised by counsel for the accused would tend to correct any resultant harmful error, and the evidence of overwhelming guilt adduced against the accused negatives any suggestion that material harm was caused the accused."

b. Principles enunciated in the case of In Re YAMASHITA, #61 and #672, Supreme Court, October, 1945:

Article 63 of the Geneva Convention of 1929, requiring that sentences passed against a prisoner of war be pronounced only "by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the Detaining Power" does not apply to an accused charged with the commission of a war crime prior to his becoming a prisoner of war.

Charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. The court relied on COLLINS v. MCDONALD 258 U. S. 416.

SEC Miscellaneous Authorities
440

a. Particulars, multiplicity of; extract from Opinion of Deputy Theater Judge Advocate, case of UNITED STATES v. FRANZ STRASSER, October 1945:

"Accused charged in one specification with unlawfully killing an unknown American airman, and in a separate specification, under a second charge, with unlawfully shooting an American airman. The evidence established that five American soldiers were killed at the time and place alleged in the two specifications, and that the accused participated in the unlawful killing of all five. It would have been preferable to have alleged in one specification that the accused, acting in concert with unapprehended accused, participated in the unlawful killing of five American airmen." Held, however, that no prejudice resulted thereby to any substantial right of the accused.

b. Death sentences, method of execution thereof; extract from Opinion of Deputy Theater Judge Advocate, case of UNITED STATES v. CLEMENS WIEGAND, November, 1945:

"Modification of the sentence from death by decapitation to death by hanging is discretionary with the Appointing Authority (paragraphs 216, 222, Section 2, Part I, Handbook 'Military Government Germany, Technical Manual for Legal and Prison Officers, 2nd Edition'), and in the instant case justified for the reasons stated in the review of the Staff Judge Advocate, i.e., that execution by hanging is in accordance with methods prevailing under our domestic law, and that execution by decapitation, although consistent with German criminal law, might offend the sensibilities of people in the United States."

SEC 450 Payment of Witness Fees

a. Allied witnesses:

Civilian witness fees of friendly allied nationals should be paid from appropriated funds in accordance with the provisions of AR 35-4120, dated 30 July 1943, as amended, and Circular 76, this headquarters, dated 4 June 1945. Such payment should be made on War Department Form 338, the administrative certificate thereon to be signed by the chief prosecutor of the war crimes case.

b. Friendly German nationals.

Civilian witness fees of German nationals who are friendly witnesses should be paid according to the provisions of letter, this headquarters, file AG 000.5, WCB-AGO, subject: "Fees and Allowances of Military Government Courts Especially Appointed for the Trial of Cases Involving War Crimes," dated

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7 September 1945. The vouchers for payment of such witness fees or expenses will be signed by the chief prosecutor of the war crimes case and will be in the form of a certificate showing an itemized statement of the sum due the witness.

SEC 450

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7 September 1945. The vouchers for payment of such witness fees or expenses will be signed by the chief prosecutor of the war crimes case and will be in the form of a certificate showing an itemized statement of the sum due the witness.

PART V
OUTLINE OF TRIAL

SEC. Outline Of A Trial Before A General Or Intermediate
501 Military Government Court.

PRES: THE COURT WILL COME TO ORDER.

PROS: THE PROSECUTION IS READY TO PROCEED WITH THE CASE
OF THE ACCUSED (A MALE) (A FEMALE), IS
PRESENT, TOGETHER WITH THE REGULARLY ASSIGNED
DEFENSE COUNSEL.

The members of the court shall be furnished with a
dossier of the case prior to trial. The members of the
court should have before them during the trial copies
of the charge and particulars.

PRES: THE COURT HAS APPOINTED AS INTERPRETER.
HE WILL BE SWORN. The interpreter rises and
faces the President who asks: DO YOU SWEAR BY
ALMIGHTY GOD (SOLEMNLY AFFIRM) THAT YOU WILL, TO
THE BEST OF YOUR ABILITY, TRULY TRANSLATE THE
PROCEEDINGS OF THIS COURT AS THE COURT MAY REQUIRE?
(MGR 5-914, No. 2).

INTERPRETER: I DO.

The prosecutor, defense counsel, and members of the court,
in conducting their interrogations, should propound their
questions by addressing the witness directly, and the
interpreter should translate directly and verbatim, and
in the same person, everything that is said subject to
the direction of the court. He should not be permitted to
engage in colloquy on his own. The accused is entitled
to have the proceedings translated when he is otherwise
unable to understand the language in which they are
conducted.

Note that the president, and not the prosecutor, administers
all oaths.

PRES: THE COURT HAS APPOINTED AS REPORTER. HE
WILL BE SWORN. The reporter rises and faces the
President who asks: DO YOU SWEAR BY ALMIGHTY GOD
(SOLEMNLY AFFIRM) THAT YOU WILL, TO THE BEST OF

1 April 1947

YOUR ABILITY, TRULY RECORD AND TRANSCRIBE THE PROCEEDINGS OF THIS COURT? (MGR 5-914, No. 3).

REPORTER: I DO.

PRES: (If an Adviser has been appointed.) THE COURT HAS APPOINTED AS ADVISER TO THE COURT. HE WILL BE SWORN. The Adviser rises and faces the President who asks: DO YOU SWEAR BY THE ALMIGHTY GOD (SOLEMNLY AFFIRM) THAT YOU WILL, TO THE BEST OF YOUR ABILITY, ACT IMPARTIALLY AS ADVISER TO THIS COURT?

ADVISER: I DO.

PRES: WHOM DOES THE ACCUSED DESIRE TO INTRODUCE AS COUNSEL IN ADDITION TO THE REGULARLY ASSIGNED DEFENSE COUNSEL?

In the event of special counsel, such counsel is introduced as follows:

DC : THE ACCUSED DESIRES TO INTRODUCE AS SPECIAL DEFENSE COUNSEL
(Name) (Nationality) (Profession)
WHO IS DULY QUALIFIED TO PRACTICE BEFORE THIS COURT.

In the event of civilian counsel, the court must satisfy itself and the record must show affirmatively that such counsel has permission of, and is authorized by, the Military Government to practice law. A statement of the court in the record to that effect will suffice. (MGR 5-322.2)

PROS: THE FOLLOWING MEMBERS OF THE COURT ARE PRESENT:
.

No member of the court or of the prosecution is sworn.

PROS: _____ IS ABSENT, HAVING BEEN DULY EXCUSED
(Rank) (Name)
BY THE APPOINTING AUTHORITY OR HIS DELEGATE.

PROS: THE GENERAL NATURE OF THE CHARGE AND PARTICULARS IS

PROS: IS ANY MEMBER OF THE COURT FUNDAMENTALLY OPPOSED TO CAPITAL PUNISHMENT?

This question need be asked only in cases being tried before General Courts and the Court will excuse as disqualified any member who is opposed to such punishment.

1 February 1947

PROS: THE PROSECUTION WILL (NOT) CALL ANY MEMBER OF THE COURT AS A WITNESS. WILL THE ACCUSED CALL ANY MEMBER OF THE COURT AS A WITNESS?

DC: NO (YES).

PROS: HAS ANY MEMBER OF THE COURT A PERSONAL INTEREST IN THE CASE?

The court should excuse any member of the court who will be called as a witness in the case or has a personal interest in it.

PRES: (After interrogating other members of the Court): NO.

PROS: (Rank) --- (Name) ---, A MEMBER OF THE COURT, IS AN OFFICER WITH LEGAL TRAINING (L-6d).

PRES: THE COURT HAS SATISFIED ITSELF THAT IT IS PROPERLY CONSTITUTED UNDER THE LAWS AND RULES GOVERNING MILITARY GOVERNMENT COURTS AND HAS JURISDICTION OVER THE PERSON (S) AND OFFENSE (S) OF THE ACCUSED. IF EITHER THE PROSECUTION OR DEFENSE HAS ANY GROUND FOR CHALLENGE OF ANY MEMBER, IT IS REQUESTED THAT IT BE DISCLOSED NOW. (If none disclosed, add) THERE BEING NO GROUND FOR CHALLENGE, THE COURT IS DECLARED TO BE PROPERLY CONSTITUTED.

Only challenges for cause may be exercised as neither the prosecution nor the defense is entitled to peremptory challenges. Challenges will be decided by a majority vote of the court unless the basis for challenge is such that obviously the challenged member should be excused and it is unnecessary to go through the formality of voting.

PRES: THE TRIAL WILL BE CONDUCTED IN OPEN COURT (IN CAMERA).

The court by majority vote is empowered to order trial in camera if it is necessary for security, protection of witnesses or other good reason. Any order for trial in camera will be noted on the record and a report attached stating the reasons therefor (MCR 5-327.6).

PRES TO ACC: ALL INTERLOCUTORY QUESTIONS ARISING DURING THIS TRIAL WILL BE RULED UPON BY THE PRESIDENT SUBJECT TO OBJECTION BY ANY MEMBER OF THE COURT.

PRES: THE ACCUSED WILL NOW BE INTERROGATED AS TO HIS NAME, AGE, RESIDENCE, NATIONALITY AND STATUS.

The accused will always stand when addressed.

PRES. TO ACC: YOU ARE ADVISED THAT UNDER THE LAW OF MILITARY GOVERNMENT YOU ARE ENTITLED IN THIS COURT TO THE FOLLOWING:

1. TO HAVE, IN ADVANCE OF TRIAL, A COPY OF THE CHARGES UPON WHICH YOU WILL BE TRIED.

While no time in advance of trial is prescribed, the purpose of this provision is to enable the accused to receive a copy of such charges sufficiently in advance of trial as will assure him a fair trial and afford him an opportunity to prepare a defense.

2. TO BE PRESENT AT YOUR TRIAL, TO GIVE EVIDENCE, AND TO EXAMINE OR CROSS-EXAMINE ANY WITNESS.
3. TO CONSULT COUNSEL BEFORE TRIAL AND TO CONDUCT YOUR OWN DEFENSE OR TO BE REPRESENTED AT THE TRIAL BY COUNSEL OF YOUR OWN CHOICE, SUBJECT TO THE RIGHT OF THIS COURT TO DEBAR ANY PERSON FROM APPEARING BEFORE IT.
4. IN ANY CASE IN WHICH A SENTENCE OF DEATH MAY BE IMPOSED TO BE REPRESENTED BY A MEMBER OR CIVILIAN ATTORNEY OF THE UNITED STATES FORCES AND SUCH OTHER COUNSEL AS THE ACCUSED MAY DESIGNATE.

Defense Counsel will be assigned in all cases (L 6d).

5. TO BRING WITH YOU TO THIS TRIAL SUCH MATERIAL WITNESSES IN YOUR OWN DEFENSE AS YOU MAY WISH, OR TO HAVE THEM SUMMONED BY THE COURT AT YOUR REQUEST, IF PRACTICABLE.
6. TO APPLY TO THE COURT FOR AN ADJOURNMENT WHERE NECESSARY TO ENABLE YOU TO

1 April 1947

PREPARE YOUR DEFENSE.

7. TO HAVE THE PROCEEDINGS TRANSLATED WHEN YOU ARE OTHERWISE UNABLE TO UNDERSTAND THE LANGUAGE IN WHICH THEY ARE CONDUCTED.
8. IN THE EVENT OF CONVICTION TO FILE A PETITION FOR REVIEW TO THE APPOINTING AUTHORITY SETTING FORTH GROUNDS WHY THE FINDINGS AND SENTENCE SHOULD BE SET ASIDE OR MODIFIED.

Such petition shall be filed on Legal Form No. 10 within ten (10) days after the announcement of the Court's decision unless before the expiration of such ten (10) days the court extends such period for good cause shown (MGR 5-311.3)

PRES. TO ACC: DO YOU UNDERSTAND?

ACC. : YES, SIR.

PRES. TO ACC: ARE YOU NOW READY FOR TRIAL IN THIS CASE?

ACC. : YES, SIR.

PRES. TO ACC: HAS A COPY OF THE CHARGE SHEET BEEN SERVED UPON YOU PRIOR TO TRIAL?

ACC. : YES, SIR.

PRES. TO ACC: WERE YOU PHOTOGRAPHED AND FINGERPRINTED AT THE TIME YOU WERE SERVED WITH THE CHARGES?

ACC. : YES, SIR.

PRES. TO PROS: YOU WILL NOW OFFER IN EVIDENCE AS EXHIBIT P-1 THE ACCOMPLISHED MCG FORM NO. 38.

PROS. : YES, SIR.

PRES. TO ACC: I WILL NOW READ TO YOU THE CHARGE (S) AND PARTICULARS.

The president reads to the accused the charge(s) and particulars as set forth in the charge sheet. After the reading of EACH particular and EACH charge the court will ask the accused in the language next below set out, if he understands the same and whether he pleads guilty or not guilty to it (MGR 5-324.3). The court may accept a plea of guilty to an offense other than that charged (MGR 5-324.4).

PRES. TO ACC: DO YOU UNDERSTAND THE CHARGE (PARTICULARS)?

ACC. : YES, I DO.

If the issue of insanity is raised, it should be done here. The court will then proceed as set forth in Part III, Sec. 360, of this Outline.

PRES. TO ACC: HOW DO YOU PLEAD?

ACC. : (GUILTY) (NOT GUILTY)

If the plea is guilty:

PRES. TO ACC: DO YOU UNDERSTAND THAT BY A PLEA OF GUILTY YOU ADMIT AS TRUE ALL PARTICULARS AND THE CHARGE AS SET FORTH IN THE CHARGE SHEET AND THAT WITHOUT FURTHER PROOF THE COURT CAN IMPOSE ANY LAWFUL SENTENCE, INCLUDING DEATH (IN A GENERAL MILITARY GOVERNMENT COURT) (UP TO TEN (10) YEARS IMPRISONMENT IF AN INTERMEDIATE COURT)? (MGR 5-325; MGR 5-328).

ACC. : YES, SIR.

PRES. TO ACC: DO YOU DESIRE TO CHANGE YOUR PLEA TO ONE OF NOT GUILTY?

ACC. : NO, SIR.

While the court may sentence on plea of guilty without further proof, it must receive evidence to determine that plea was not improvident or unqualified. After hearing such evidence the court will be closed and will determine by majority vote whether such plea of guilty should be entered for the accused.

If it determines that the plea of guilty will be entered, a finding of guilty by not less than two-thirds vote should be made by the court and announced in open court. The court will then receive evidence to (a) ascertain extenuating circumstances, if any, and (b) to enable it to determine the sentence to be imposed. (MGR 5-325a; MGR 5-328) This may properly include evidence of character of the accused and prior convictions, if any. The court will then be closed, decide upon the sentence to be imposed upon the accused by not less than two-thirds vote, reopen and announce the sentence in open court.

1 May 1947

If the court determines that a plea of guilty should not be accepted and it is determined that a plea of not guilty should be entered for the accused (MGR 5-324.5), the court will open and announce:

PRES. TO ACC: A PLEA OF NOT GUILTY WILL BE ENTERED
AND THE CASE WILL BE TRIED AS IF SUCH
A PLEA HAD BEEN MADE BY THE ACCUSED.

The court may not accept a plea of guilty and must enter a plea of not guilty to any offense involving the death penalty, providing, however, that a plea of guilty to an offense punishable by death may be accepted, if the court is satisfied from the nature of the case that the punishment of death would be clearly excessive and that a lesser punishment would suffice (MGR 5-328).

The court may, on its own motion, or at the request of the accused, at any time before the sentence, alter a plea of guilty to one of not guilty (MGR 5-330).

If there is more than one defendant, and one or more, but not all, plead guilty, or if a single defendant pleads guilty to one or more, but not all of the charges, the court shall defer sentence on any of the charges until the trial of all is completed, in order to impose one sentence on each defendant with respect to all the charges to which he has pleaded or has been found guilty.

The president or any member of the court may interrogate the accused on facts pertinent to the charge and particulars, but will not apply any compulsion to require him to answer. Any statements made by the accused will be evidence in the case. Attention is invited to paragraph c, Section 220, supra, in which it is emphasized that occasion should very seldom arise in war crimes trials, where adequate prosecution and defense counsel are always available, for interrogation of accused or witnesses by the court. In any event, an orderly development of cases dictates that courts not do so until prosecution and defense counsel have finished with the witness. Likewise,

1 February 1947

WITNESS: (Indicates the accused.)

PROS: NO FURTHER QUESTIONS. DOES THE DEFENSE DESIRE TO CROSS-EXAMINE?

DC : THE DEFENSE DOES (NOT).

PROS: ANY QUESTIONS BY ANY MEMBER OF THE COURT?

PRES: YES (NO).

PRES: THE WITNESS IS EXCUSED.

PROS: THE PROSECUTION RESTS.

If any motion for a finding of not guilty is to be made, it is made at this time as follows: (MGR 5-327.2).

DC: THE DEFENSE MOVES AT THIS TIME FOR A FINDING OF NOT GUILTY AS TO (ALL PARTICULARS 1, 2, ETC., FIRST CHARGE, ETC.) ON THE GROUND THAT THERE IS NOT SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILTY AS TO THIS (THESE) PARTICULAR(S) AND THIS (THESE) CHARGE (S).

If any such motion is made, the court will determine the issue as in the case of any other interlocutory question and will announce its decision.

After the close of the case for the prosecution, the court may on its own motion acquit the accused on any charge, if it decides there is not sufficient evidence to support the charge and that the accused should not be required to answer it, and any such acquittal shall be entered in the record of the case (MGR 5-327.2).

The court, on application of the prosecution, may direct that any further charge or charges be preferred against the accused and may grant any necessary adjournment for that purpose (MGR 5-327.2). If no adjournment is deemed necessary, the court may proceed to make its findings and assess the punishment on such further charge without the re-introduction of the evidence already heard.

A Military Government Court may amend a charge at any time before finding, provided that an adjournment is granted if necessary, and that no injustice is thereby done the accused (MGR 5-330).

1 May 1947

Here is made the opening statement, if any, of the defense.

DC : THE DEFENSE DOES (NOT) DESIRE TO MAKE AN OPENING STATEMENT.

DC : THE DEFENSE CALLS AS ITS FIRST WITNESS _____

The president administers to the defense witnesses the same oath administered to witnesses for the prosecution.

The president or any member of the court may interrogate the accused on any facts pertinent to the charge and particulars, but will not apply any compulsion to require him to answer. An accused has no privilege against self-incrimination and he will not be warned that he is not required to answer questions (MGR 5-354.5). Attention is invited to page 407, this Section 501, in which it is emphasized that occasion seldom arises for the court to interrogate the accused and that such interrogation, if any, by the court should be postponed until near the end of the trial. Furthermore, the president has the obligation to make certain that any such interrogation is orderly and expeditious. If the accused has not already testified, the president should always give him an opportunity to testify immediately before the defense is permitted to rest in the manner hereinafter indicated.

PRES. TO ACC: YOU MAY MAKE A SWORN OR AN UNSWORN STATEMENT, ON WHICH YOU MAY BE CROSS-EXAMINED. YOU ARE ADVISED THAT THE COURT MAY DRAW SUCH INFERENCES AS THE CIRCUMSTANCES JUSTIFY FROM YOUR REFUSAL TO ANSWER OR FROM YOUR FAILURE TO TAKE THE STAND IN YOUR OWN BEHALF. ARE YOU NOW WILLING TO TESTIFY?

DC : THE DEFENSE RESTS.

PROS: THE PROSECUTION HAS NOTHING FURTHER. DOES THE COURT DESIRE ANY WITNESSES CALLED OR RECALLED? (MGR 5-327.3).

PRES: THE COURT DOES (NOT).

PROS: (Argument).

DC : (Argument).

1 May 1947

It will be noted that the defense has the right to close (MGP 5-327.1 f).

PRES: THE COURT WILL BE CLOSED.

The findings of the court as to the guilt or innocence of the accused and, if guilty, as to the sentence to be imposed, must be by the concurrence of at least two-thirds of all the members present at the time the vote is taken (I-7b).

The court will be opened in the presence of the accused, his counsel, the interpreter, the reporter, and the personnel of the prosecution, all of whom remain standing (except the reporter) at which time the president announces:

PRES: THE COURT, IN CLOSED SESSION, AT LEAST TWO-THIRDS OF THE MEMBERS PRESENT AT THE TIME THE VOTE WAS TAKEN CONCURRING IN EACH FINDING OF GUILTY FINDS YOU:

OF ALL PARTICULARS AND THE CHARGE: GUILTY

OR

OF PARTICULAR 1, FIRST CHARGE : GUILTY

OF PARTICULAR 2, FIRST CHARGE : NOT GUILTY

OF FIRST CHARGE : GUILTY

PRES: THE COURT ACQUITS YOU OF ALL PARTICULARS AND THE CHARGE (c)

Irrespective of the result of trial, the accused will be returned to custody pending final disposition (I 8a).

A Military Government Court shall announce its findings on each particular and charge before it, and shall pro-

15 July 46

nounce one sentence in respect of all the charges upon which the accused is found guilty (MGR 5-331).

The findings, as well as the sentence, must be announced in open court (MGR 5-327.1).

PRES: THE COURT WILL HEAR EVIDENCE OF PREVIOUS CONVICTIONS AND OF ANY EXTENUATING CIRCUMSTANCES.

Evidence of any previous convictions of the accused in any court may be received (MGR 5-327.1).

PROS: THE PROSECUTION HAS (NO) EVIDENCE OF PREVIOUS CONVICTIONS.

PRES. TO ACC: DOES THE ACCUSED DESIRE TO INTRODUCE EVIDENCE OF EXTENUATING CIRCUMSTANCES OR TO MAKE ANY FURTHER STATEMENT TO THE COURT? (MGR 5-327.1).

DC : THE ACCUSED DOES (NOT).

PRES: THE COURT WILL BE CLOSED.

The procedure for voting on the sentence is the same as for voting on findings (L 7b)

The court will be opened in the presence of the accused, his counsel, the interpreter, the reporter, and the personnel of the prosecution, all of whom remain standing (except the reporter) at which time the president announces:

PRES: THE COURT IN CLOSED SESSION, AT LEAST TWO-THIRDS OF THE MEMBERS PRESENT AT THE TIME THE VOTE WAS TAKEN CONCURRING, SENTENCES YOU:

1. TO BE IMPRISONED FOR A TERM OF 194 AT OR SUCH OTHER PLACE AS MAY BE DESIGNATED BY COMPETENT MILITARY AUTHORITY.
2. TO LIFE IMPRISONMENT COMMENCING FORTHWITH AT OR SUCH OTHER PLACE AS MAY BE DESIGNATED BY COMPETENT MILITARY AUTHORITY.
3. TO DEATH BY HANGING AT SUCH TIME AND PLACE AS HIGHER AUTHORITY MAY DIRECT.

15 July 46

Upon approval of a sentence of death, an order will be issued directing the execution of the sentence. The arrangements and procedure for the execution will be as prescribed by the authority appointing the court.

(As to sentence powers of the court, see above Sec. 250).

PRES: IS THERE ANYTHING FURTHER TO BE PRESENTED TO THE COURT?

PROS: YES (NO).

PRES: THE COURT ADJOURNS. SUBJECT TO CALL BY THE PRESIDENT.

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15 July 1946

P A R T V I

CASE RECORD

Attachments to Form No. 8.

The case record will consist of Legal Form No. 8, the front and reverse sides of which should be filled out completely, in which should be inserted the following:

1. Petition for Review (Legal Form No. 10 (CA/G1/15)).
2. Special orders appointing court (including amending orders).
3. Letter or Order referring case to the court.
4. Charge Sheet (Legal Form No. 3 (CA/G1/8)).
5. Record of Testimony (including exhibits) in duplicate.
6. Commitment (Legal Form No. 5 (CA/G1/10)).
7. Miscellaneous Papers.

SEC
610

Sample Form of Record and Prescribed Copies.

A general outline of record of testimony is attached hereto.

It is desirable that an original and four (4) copies of the transcript of the testimony be made in all war crimes cases. It is not necessary to duplicate initial papers and exhibits.

SEC
610

15 July 1946

RECORD OF TESTIMONY

in trial of

by

GENERAL MILITARY GOVERNMENT COURT

tried at

19

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Extenuating Circumstances

TESTIMONY

Name of Witness	Direct Page	Cross Page	Redirect Page	Recross Page	Court Page	Re- called Page
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15 July 1946

EXHIBITS, ETC., APPENDED

Description ----- Number ----- Page where introduced -----

A General Military Government Court appointed by (Des-
cribe special orders) met at (place) on the -- day of (month) --
19 --, (time) hours, as directed by the President thereof.

The Court proceeded in open court to the trial of
-----, accused, who was present.

(Rank) (name) --, a member of the court, is an
officer with legal training.

The Court appointed (Grade) (name) (ASN) (organization)
as interpreter for the case, and he was duly sworn.

(If an interpreter is appointed to assist the accused
and his counsel, the record should so indicate).

The Court appointed (Grade) (name) (ASN) (organization)
as reporter for the case, and he was duly sworn.

(If the court appoints an adviser, the record should so
indicate and he should be sworn).

(If it was agreed by the court that the president would
rule on all interlocutory questions, subject to the objection
of any member of the court, the record should so indicate).

PTES: Whom does the accused desire to introduce as counsel?
(see page 402)

DC : The Defense Counsel.

(DC : The accused desires to introduce as counsel -- (Name)
-- (nationality) (profession) --, who is duly qualified to
practice before this court. (If such special counsel is a
lawyer, the record will contain a statement that he is not

1 April 1947

debarred by Military Government from appearing before the court.)

All members of the Court appointed by the foregoing Special Order(s) and all prosecution and defense counsel assigned to the case were present (except -----, excused by appropriate authority).

The prosecutor stated the general nature of the Charges and Particulars.

PROS: Is any member or members of the Court fundamentally opposed to capital punishment?

PRES: (After interrogating the members of the Court): No.

PROS: The prosecution will not call any member of the Court as a witness. Will the accused call any member as a witness?

DC : No, sir.

PROS: Has any member of the Court a personal interest in this case?

PRES: (After interrogating the members of the court) No.

PRES: The Court has satisfied itself that it is properly constituted under the laws and rules governing Military Government Courts and has jurisdiction over the person(s) and offense(s) of the accused. If either the prosecution or the defense has any ground for challenge of any member, it is requested that it be disclosed now. (If none disclosed, add:) There being no grounds for challenge, the Court is declared to be properly constituted.

PRES: The Trial will be conducted in open Court (in camera).

(If in camera, state reasons)

The Court interrogated the accused as to his name, age, residence, nationality, and status (civilian or military) as follows:

PRES: -----

ACC : -----

PRES: -----

ACC : -----

SLC
610

1 April 1947

The Court interrogated the accused with respect to his physical and mental condition as follows:

PRES: -----

ACC : -----

PRES: -----

ACC : -----

After consideration by the Court in closed session, the President announced that it was the decision of the Court that the physical and mental maturity of the accused was such that he (she) would be tried in all respects as an adult person.

President advised the accused of his (her) rights as set forth in Section 501, Supra. Upon interrogation the accused stated that he (she) understood such rights.

PRES to ACC: Are you now ready for trial in this case?

ACC : Yes sir.

PRES to ACC: Has a copy of the Charge Sheet been served upon you prior to trial?

ACC : Yes sir.

PRES to ACC: Were you photographed and fingerprinted at the time you were served with the charges?

ACC : Yes, sir.

PRES to ACC: You will now offer in evidence as Exhibit P-1 the accomplished JCG Form No. 38.

PROS : Yes, sir.

ARRAIGNMENT

PRES: I will now read to you the Charge and Particulars.

The Court then read to the accused the Charge and Particulars as set forth in the Charge Sheet.

1 February 1947

PRES TO ACC: Do you understand the Charge and Particulars?

ACC : I do.

PLEAS

PRES TO ACC: How do you plead?

(If there is more than one charge, the above procedure is followed as to each charge, the accused pleading to each charge and particulars separately.)

ACC: To the Charge and Particulars, (Not Guilty) (Guilty).

(If the plea is "Guilty", the following should appear:)

The accused was asked whether he understood that, by a plea of guilty, he admitted as true all Particulars and the Charge as set forth in the Charge Sheet, and that, without further proof, the Court could impose any lawful sentence, including death (if a General Military Government Court) (up to 10 years and RM 100,000, if an Intermediate Military Government Court) to which he replied that he did (not) understand. Accused was then asked whether he desired to change his plea to one of "Not Guilty".

ACC: Yes sir.

Whereupon the plea was changed to Not Guilty.

(If the plea of guilty was not changed, the court should proceed as indicated on page 406, supra).

SEC 610

1 February 1947

The prosecutor then made an opening statement to the Court.

TESTIMONY OF WITNESSES

TESTIMONY FOR THE PROSECUTION.

~~prosecution, was sworn and testified~~, a witness for the
interpreter) as follows:

DIRECT EXAMINATION

CROSS EXAMINATION

REDIRECT EXAMINATION

RECROSS EXAMINATION

EXAMINATION BY THE COURT

(After the prosecution has offered all its evidence):

PROS: The prosecution rests.

1 February 1947

(If the defense makes a motion for any finding of not guilty):

DC: The defense moves at this time, etc.....

(If any such motion is made, the court will determine the issue as the case of any other interlocutory question and will announce its decision).

The defense counsel then made (or waived) his opening statement to the Court:

TESTIMONY FOR THE DEFENSE:

was sworn and testified (through an interpreter) as follows:

DIRECT EXAMINATION

CROSS EXAMINATION

REDIRECT EXAMINATION

RECROSS EXAMINATION

EXAMINATION BY THE COURT

STATEMENT OF ACCUSED

(If the accused elects to make a statement): The accused elected to make the following unsworn (sworn) statement:

15 July 1946

DIRECT EXAMINATION

CROSS EXAMINATION

REDIRECT EXAMINATION

RECROSS EXAMINATION

EXAMINATION BY THE COURT

(After the defense has offered all its evidence:)

DC: The defense rests.

(If the prosecution has rebuttal testimony, use the subhead REBUTTAL and record the testimony thereunder).

The prosecution announced that it had no further testimony to offer.

The defense announced that it had no further testimony to offer.

The President stated that the Court did not desire to call or recall any witness.

Oral arguments were made by the prosecutor and defense counsel.

The Court was closed to consider its findings after which it was opened.

FINDINGS

(If there is a finding of guilty):

15 July 1946

PRES: The Court, in closed session at least two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of all Particulars and the Charge: Guilty.

OR

Of Particulars 1, First Charge: Guilty
Of Particulars 2, First Charge: Not Guilty
Of the First Charge : Guilty

(If there is a finding of not guilty):

PRES: The Court acquits you of all Particulars and the Charge.

TESTIMONY AS TO PREVIOUS CONVICTIONS AND EXTENUATING CIRCUMSTANCES.

(If there is any finding of guilty):

PRES: The Court will hear evidence of previous convictions and of any extenuating circumstances.

(Here set forth the testimony and any statements of prosecutor, defense counsel, and accused).

The Court was closed to consider the sentence, after which it was opened.

PRES: The Court, in closed session, at least two-thirds of the members present at the time the vote was taken concurring sentences you:

The Court then at _____ o'clock _____ M., on _____ 194____, proceeded to other business OR adjourned to meet at the call of the President.

_____(President)_____(Member)____ of the Court.



Col. Wade
ms

THE COMMISSIONER FOR THE UNITED STATES OF AMERICA
ON THE
UNITED NATIONS WAR CRIMES COMMISSION



1505

ALDFORD HOUSE, PARK LANE, W.1.
TELEPHONE GROSVENOR 4631

London, October 27, 1947

Dear Mr. Brand:

Enclosed herewith please find Change 5 to the "Manual
for Trial of War Crimes and Related Cases", now in use by
United States War Crimes Group in Germany.

Sincerely,

Robert M. Springer

ROBERT M. SPRINGER
Colonel, USA
United States Commissioner
United Nations War Crimes Commission

Enclosure: 1
as stated, dated 6 Oct. 1947

Mr. George Brand
Legal Officer
United Nations War Crimes Commission
Lansdowne House
Berkeley Square
London, W.1

HEADQUARTERS
7708 WAR CRIMES GROUP
EUROPEAN COMMAND
APO 407

6 October 1947

CHANGE 5

MANUAL FOR TRIAL OF WAR CRIMES AND RELATED CASES

1. Be sure to adhere to the instructions in the Foreword to the Manual, and file this Change 5 in the front of the Manual.

2. Change:

<u>Section Altered or Added</u>	<u>Date of Change</u>	<u>Pages Affected</u>	<u>Reason</u>
501	1 Oct 47	406	Correction in question by president to accused re sentence that may be imposed on plea of guilty. (Remove old page 406 and insert new page 406.)

C. E. Straight
C. E. STRAIGHT
Lt Col JAGD
Deputy Judge Advocate
for War Crimes

1 Incl:
New page 406

If the issue of insanity is raised, it should be done here. The court will then proceed as set forth in Part III, Sec. 360, of this Outline.

PRES. TO ACC: HOW DO YOU PLEAD?

ACC. : (GUILTY) (NOT GUILTY)

If the plea is guilty:

PRES. TO ACC: DO YOU UNDERSTAND THAT BY A PLEA OF GUILTY YOU ADMIT AS TRUE ALL PARTICULARS AND THE CHARGE AS SET FORTH IN THE CHARGE SHEET AND THAT WITHOUT FURTHER PROOF THE COURT CAN IMPOSE ANY LAWFUL SENTENCE, EXCLUDING DEATH (IF A GENERAL MILITARY GOVERNMENT COURT) (UP TO TEN (10) YEARS IMPRISONMENT IF AN INTERMEDIATE COURT)? (MGR 5-325; MGR 5-328).

ACC. : YES, SIR.

PRES. TO ACC: DO YOU DESIRE TO CHANGE YOUR PLEA TO ONE OF NOT GUILTY?

ACC. : NO, SIR.

While the court may sentence on plea of guilty without further proof, it must receive evidence to determine that plea was not improvident or unqualified. After hearing such evidence the court will be closed and will determine by majority vote whether such plea of guilty should be entered for the accused.

If it determines that the plea of guilty will be entered, a finding of guilty by not less than two-thirds vote should be made by the court and announced in open court. The court will then receive evidence to (a) ascertain extenuating circumstances, if any, and (b) to enable it to determine the sentence to be imposed. (MGR 5-325a; MGR 5-328) This may properly include evidence of character of the accused and prior convictions, if any. The court will then be closed, decide upon the sentence to be imposed upon the accused by not less than two-thirds vote, reopen and announce the sentence in open court.

HEADQUARTERS
7708 WAR CRIMES GROUP
EUROPEAN COMMAND
APO 407

15 September 1947

CHANGE 4

MANUAL FOR TRIAL OF WAR CRIMES AND RELATED CASES

1. Be sure to adhere to the instructions in the Foreword to the Manual, and file this Change 4 in the front of the Manual.

2. Changes:

<u>Section Altered or Added</u>	<u>Date of Change</u>	<u>Pages Affected</u>	<u>Reason</u>
501	15 Sep 47	402, 402.1	Insertion of more specific provisions concerning appointment of court, service of charges, reference of case for trial, assignment of counsel, and introduction of exhibits concerning the same. (Remove old page 402, and insert new pages 402 and 402.1.)
501	15 Sep 47	404	Insertion of additional provision concerning personal data. (Remove old page 404 and insert new page 404.)
501	15 Sep 47	405	Change in exhibit designation for WCG Form No. 38. (Remove old page 405 and insert new page 405.)

C. E. Straight
C. E. STRAIGHT
Lt Col JAGC
Deputy Judge Advocate
for War Crimes

4 Incls:
New Pages 402, 402.1,
404, 405.

15 September 1947

YOUR ABILITY, TRULY RECORD AND TRANSCRIBE THE PROCEEDINGS OF THIS COURT? (MCR 5-014, No. 3).

REPORTER: I DO.

PRES: (If an adviser has been appointed.) THE COURT HAS APPOINTED _____ AS ADVISER TO THE COURT. HE WILL BE SWORN. The Adviser rises and faces the President who asks: DO YOU SWEAR BY THE ALMIGHTY GOD (SOLENNLY AFFIRM) THAT YOU WILL, TO THE BEST OF YOUR ABILITY, ACT IMPARTIALLY AS ADVISER TO THIS COURT?

ADVISER: I DO.

PROS: THIS COURT HAS BEEN APPOINTED PURSUANT TO SPECIAL ORDERS NO. _____, PARAGRAPH _____, HEADQUARTERS, EUROPEAN COMMAND, DATED THE _____ DAY OF _____. A COPY THEREOF IS OFFERED IN EVIDENCE AS EXHIBIT P-1.

PROS: A COPY OF THE CHARGES UPON WHICH THE ACCUSED ARE TO BE TRIED WAS SERVED UPON THE (EACH) ACCUSED ON THE _____ DAY OF _____, AS SHOWN BY THE SERVICE OF CHARGES ENTERED UPON A COPY THEREOF, WHICH I NOW OFFER IN EVIDENCE AS EXHIBIT P-2.

PROS: THIS CASE OF THE UNITED STATES V. _____ (ET AL.) WAS REFERRED TO THIS COURT FOR TRIAL ON THE CHARGES BY LETTER OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES, DATED THE _____ DAY OF _____, WHICH IS NOW OFFERED IN EVIDENCE AS EXHIBIT P-3.

PROS: THE PROSECUTION AND DEFENSE COUNSEL FOR THIS TRIAL WERE ASSIGNED BY LETTER OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES, DATED THE _____ DAY OF _____. I OFFER THE SAME IN EVIDENCE AS EXHIBIT P-4.

PRES: WHOM DOES THE ACCUSED DESIRE TO INTRODUCE AS COUNSEL IN ADDITION TO THE REGULARLY ASSIGNED DEFENSE COUNSEL?

In the event of special counsel, such counsel is introduced as follows:

DC : THE ACCUSED DESIRES TO INTRODUCE AS SPECIAL DEFENSE COUNSEL _____ (Name) _____ (Nationality) _____ (Profession) _____ WHO IS DULY QUALIFIED TO PRACTICE BEFORE THIS COURT.

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In the event of civilian counsel, the court must satisfy itself and the record must show affirmatively that such counsel has permission of, and is authorized by, the Military Government to practice law. A statement of the court in the record to that effect will suffice.
(MGR 5-322.2)

PROS: THE FOLLOWING MEMBERS OF THE COURT ARE PRESENT:

.

No member of the court or of the prosecution is sworn.

PROS: IS ABSENT, HAVING BEEN DULY EXCUSED
(Rank)(Name),
BY THE APPOINTING AUTHORITY OR HIS DELEGATE.

PROS: THE GENERAL NATURE OF THE CHARGE AND PARTICULARS
IS

PROS: IS ANY MEMBER OF THE COURT FUNDAMENTALLY OPPOSED
TO CAPITAL PUNISHMENT?

This question need be asked only in cases being tried before General Courts and the Court will excuse as disqualified any member who is opposed to such punishment.

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PRES: THE ACCUSED WILL NOW BE INTERROGATED AS TO HIS NAME, AGE, RESIDENCE, NATIONALITY, CIVILIAN OCCUPATION, PARTY MEMBERSHIP, MILITARY STATUS, AND LENGTH OF PERIOD IN DETENTION.

The accused will always stand when addressed.

PRES. TO ACC: YOU ARE ADVISED THAT UNDER THE LAW OF MILITARY GOVERNMENT YOU ARE ENTITLED IN THIS COURT TO THE FOLLOWING:

1. TO HAVE, IN ADVANCE OF TRIAL, A COPY OF THE CHARGES UPON WHICH YOU WILL BE TRIED.

While no time in advance of trial is prescribed, the purpose of this provision is to enable the accused to receive a copy of such charges sufficiently in advance of trial as will assure him a fair trial and afford him an opportunity to prepare a defense.

2. TO BE PRESENT AT YOUR TRIAL, TO GIVE EVIDENCE, AND TO EXAMINE OR CROSS-EXAMINE ANY WITNESS.
3. TO CONSULT COUNSEL BEFORE TRIAL AND TO CONDUCT YOUR OWN DEFENSE OR TO BE REPRESENTED AT THE TRIAL BY COUNSEL OF YOUR OWN CHOICE, SUBJECT TO THE RIGHT OF THIS COURT TO DEBAR ANY PERSON FROM APPEARING BEFORE IT.
4. IN ANY CASE IN WHICH A SENTENCE OF DEATH MAY BE IMPOSED TO BE REPRESENTED BY A MEMBER OR CIVILIAN ATTORNEY OF THE UNITED STATES FORCES AND SUCH OTHER COUNSEL AS THE ACCUSED MAY DESIGNATE.

Defense Counsel will be assigned in all cases (L 6d).

5. TO BRING WITH YOU TO THIS TRIAL SUCH MATERIAL WITNESSES IN YOUR OWN DEFENSE AS YOU MAY WISH, OR TO HAVE THEM SUMMONED BY THE COURT AT YOUR REQUEST, IF PRACTICABLE.
6. TO APPLY TO THE COURT FOR AN ADJOURNMENT WHERE NECESSARY TO ENABLE YOU TO PREPARE YOUR DEFENSE.

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7. TO HAVE THE PROCEEDINGS TRANSLATED WHEN YOU ARE OTHERWISE UNABLE TO UNDERSTAND THE LANGUAGE IN WHICH THEY ARE CONDUCTED.
8. IN THE EVENT OF CONVICTION TO FILE A PETITION FOR REVIEW TO THE APPOINTING AUTHORITY SETTING FORTH GROUNDS WHY THE FINDINGS AND SENTENCE SHOULD BE SET ASIDE OR MODIFIED.

Such petition shall be filed on Legal Form No. 10 within ten (10) days after the announcement of the Court's decision unless before the expiration of such ten (10) days the court extends such period for good cause shown (MGR 5-311.3)

PRES. TO ACC: DO YOU UNDERSTAND?

ACC. : YES, SIR.

PRES. TO ACC: ARE YOU NOW READY FOR TRIAL IN THIS CASE?

ACC. : YES, SIR.

PRES. TO ACC: HAS A COPY OF THE CHARGE SHEET BEEN SERVED UPON YOU PRIOR TO TRIAL?

ACC. : YES, SIR.

PRES. TO ACC: WERE YOU PHOTOGRAPHED AND FINGERPRINTED AT THE TIME YOU WERE SERVED WITH THE CHARGES?

ACC. : YES, SIR.

PRES. TO PROS: YOU WILL NOW OFFER IN EVIDENCE AS EXHIBIT P-5 THE ACCOMPLISHED WCG FORM NO. 38.

PROS. : YES, SIR.

PRES. TO ACC: I WILL NOW READ TO YOU THE CHARGE (S) AND PARTICULARS.

The president reads to the accused the charge(s) and particulars as set forth in the charge sheet. After the reading of EACH particular and EACH charge the court will ask the accused in the language next below set out, if he understands the same and whether he pleads guilty or not guilty to it (MGR 5-324.3). The court may accept a plea of guilty to an offense other than that charged (MGR 5-324.4).

PRES. TO ACC: DO YOU UNDERSTAND THE CHARGE (PARTICULARS)?

ACC. : YES, I DO.